APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED NOVEMBER 3, 2006

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: September 15, 2006 Decided: Nov. 3, 2006)

Docket No. 05-5634-ag

G & T TERMINAL PACKAGING CO., INC. & TRAY-WRAP, INC.,

Petitioners,

—v.—

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

Before: MESKILL, SOTOMAYOR, and KATZMANN, *Circuit Judges.*

KATZMANN, Circuit Judge:

The matter at hand calls upon us to interpret the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499b, *et seq.*, specifically, to determine whether a PACA licensee bears an implied duty to refrain from paying illegal gratuities to a United States Department of Agriculture ("USDA") inspector, and the scope of the circumstances that constitute "reasonable cause" for the breach of such a duty.

Appendix A

This case arises out of the rampant corruption that existed for years, if not decades, in the Hunts Point Terminal Produce Market in the Bronx, NY. It is undisputed that many of the produce inspectors hired by the Department of Agriculture to provide impartial assessments of the condition of agricultural commodities arriving at Hunts Point for distribution throughout the metropolitan New York City area, far from acting as honest brokers, regularly accepted, and often demanded, cash payments from the merchants they were supposed to serve. When they did not receive payments from a merchant, the unscrupulous inspectors often would delay the performance of their duties or intentionally skew the results of their inspections in a manner calculated to harm the bottom line of the non-compliant merchant. In contrast, these inspectors gave preferential treatment to the merchants who crossed their palms with silver, quickly responding to their requests for inspections and, at least in some cases, shading the outcomes of their inspections in favor of merchants who agreed to pay. This situation left merchants operating in the Hunts Point Market to decide whether to acquiesce in the corruption and pay the illicit gratuities, knowing that if they did not, they risked operating at a competitive disadvantage vis-à-vis the complicit merchants. Petitioners G & T Terminal Packaging Co, Inc. and Tray-Wrap, Inc., by their agent, Anthony Spinale, chose to pay. The question now before us is whether we may affirm the Secretary of Agriculture's conclusions (1) that the petitioners breached a duty impliedly imposed by the Perishable Agricultural Commodities Act in making these illegal payments, and (2) that the situational coercion created by the inspectors' corruption did not constitute "reasonable cause" for this breach. We grant *Chevron* deference to the

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Secretary's construction of the scope of the implied duties created by the PACA and affirm that construction as reasonable. We do not decide whether the Secretary's unelaborated determination that the "extortion evidenced in this proceeding is not a 'reasonable cause' " for Spinale's payments" is similarly entitled to deference under *Chevron* because we would reach the same conclusion upon a *de novo* review. We therefore deny the petition for review and affirm the Secretary's decision.

I.

A.

The Perishable Agricultural Commodities Act establishes a wide-ranging regulatory regime governing the wholesale trade in perishable goods such as fresh fruits and vegetables.[1] As Congress explained in enacting an amendment to PACA in 1956:

> The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough' law. It was enacted in 1930 for the purpose of providing a measure of control and regulation over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for

1. 7 U.S.C. § 499a(b)(4) provides that the term "perishable agricultural commodity ... [m]eans any of the following, whether or not frozen or packed in ice: Fresh fruits and fresh vegetables of every kind and character; and ... [i]ncludes cherries in brine as defined by the Secretary in accordance with trade usages."

> sharp practices, irresponsible business conduct, and unfair methods are numerous. The law was designed primarily for the protection of the producers of perishable agricultural products—most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing—and for the protection of consumers who frequently have no more than the oral representation of the dealer that the product they buy is of the grade and quality they are paying for.
>
> The law has fostered an admirable degree of dependability and fairness in this industry chiefly through the method of requiring the registration of all those who carry on an interstate business in perishable agricultural commodities and denying this registration to those whose business tactics disqualify them.

S.Rep. No. 84-2507, at 3 (1956), *as reprinted in* 1956 U.S.C.C.A.N. 3699, 3701.

The Secretary of Agriculture is charged with implementing and enforcing this regulatory regime, which permits only persons and entities that hold a valid license from the Secretary to participate in this trade. 7 U.S.C. § 499c(a).[2] By statute, the Secretary is empowered to award

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2. This subsection provides that "no person shall at any time carry on the business of a commission merchant, dealer, or broker

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damages to persons injured by PACA violations. *See* § 499e.[3] In addition, the Secretary possesses authority to revoke a previously granted license if, after the filing of a complaint and subsequent administrative proceedings, *see generally*

(Cont'd)
without a license valid and effective at such time." 7 U.S.C. § 499c; *see also* 7 U.S.C. § 499d(a) (providing that the issuance of a license "entitle[s] the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary."). 7 U.S.C. § 499a(b)(5) defines the term "commission merchant" to mean "any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another." The term "dealer" is defined to mean, with certain exceptions, "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce." 7 U.S.C. § 499a(b)(6). "Broker" is similarly defined under the PACA, again with limited exceptions, as "any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively." 7 U.S.C. § 499a(b)(7).

3. Under the terms of this section, "[i]f any commission merchant, dealer, or broker violates any provision of section 499b of this title he shall be liable to the person or persons injured thereby for the full amount of damages ... sustained in consequence of such violation." 7 U.S.C. § 499e(a). The section further provides that "[s]uch liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this chapter are in addition to such remedies." 7 U.S.C. § 499e(b).

§ 499f, the license holder is found to have committed "flagrant or repeated" violations of § 499b. *See* § 499h(a). This sanction is strong medicine, as it has the effect of exiling the violator from the portions of the produce trade governed by the PACA. However, it is also integral to Congress' goal of restricting participation in this critical interstate trade to honest businesspersons.

B.

Petitioners G & T Terminal Packaging Co., Inc. ("G & T") and Tray-Wrap, Inc. ("Tray-Wrap") are New York corporations that have held PACA licenses since 1964 and 1970, respectively. G & T deals in wholesale potatoes, while Tray-Wrap operates in the wholesale tomato trade. The two companies share a common mailing address, a common pool of employees, and operated out of the same office at the Hunts Point Terminal Market in the Bronx, NY.[4] In addition, they share close ties to Anthony Spinale, who was the director, president and 100 percent owner of G & T, and Tray-Wrap's founder and principal manager.

In late 1996, the USDA Office of the Inspector General and the FBI launched an investigation into allegations of corruption in the USDA office in Hunts Point, tipped off by "complaints from a variety of growers that wholesalers seemed to be taking advantage of the inspection system at Hunts Point, forcing growers to make constant price

4. The Hunts Point Terminal Market is the largest wholesale produce terminal in the United States, with annual revenues in excess of $1.5 billion annually. *See* http:// www. term inalmarkets.com/ huntspoint.htm (last visited Sept. 26, 2006).

concessions." The investigators discovered that "corrupt inspectors . . . were taking cash payments (usually $50 per container of produce) from produce wholesalers in exchange for agreeing to 'downgrade' produce on inspection certificates, to the substantial financial detriment of growers." The investigation also "revealed the existence of an ongoing, coordinated criminal organization operating within the Hunts Point USDA office. Supervisory inspectors used their positions to assign corrupt inspectors under them to conduct inspections that were likely to produce payoffs. These inspectors in turn often kicked back a percentage of the cash payments to the supervisors in exchange for the favorable assignments."

William Cashin was one of the unscrupulous USDA inspectors. After his arrest, Cashin cooperated with the ongoing investigation into the Hunts Point corruption by surreptitiously making audio and video recordings of his interactions with various Hunts Point inspectors and merchants. Cashin's cooperation led to the arrest and indictment of seven other USDA inspectors. The dragnet also ensnared several merchants who were making payments to the inspectors, including Spinale, who was indicted in the Southern District of New York on October 21, 1999, and charged with nine counts of bribing a public official in violation of 18 U.S.C. §§ 201(b)(1)(A) and (2).[5] On January

5. The Hunts Point investigation and its conclusions are described in further detail in *Illegal Activities at the Hunts Point Market: Hearing Before the Subcomm. on Livestock and Horticulture of the H. Comm. on Agric.*, 106th Cong. 1-122 (2000), http://commdocs. house.gov/commi ttees/ag/hag106 58.000/hag10658 _0.htm (last visited Oct. 9, 2006).

26, 2001, Spinale pleaded guilty to Count Nine of that indictment before Magistrate Judge Ronald Ellis. In the course of his allocution, Spinale admitted that "[o]n August 13, 1999, I paid money to Bill Cashin for the purpose of influencing the outcome of his inspection report on a load of potatoes. I told him the specific amount I wanted him to put in the inspection report. On the other dates in the Indictment, I paid Mr. Cashin $100 per inspection to influence the outcome of the report." Spinale immediately followed that statement by saying, "Your Honor, I would like to state I never intended to defraud the shippers who had sent me the produce." Spinale then reiterated that he was "paying [Cashin] to dictate what he was putting into the report." He also gave an affirmative response when the court asked, "[s]o it was [Cashin's] job to make reports about the produce that he was inspecting, and you were trying to influence him to write things in the report?" On August 21, 2001, District Judge Richard C. Casey accepted Spinale's plea and sentenced him, upon a downward departure, to a five-year term of probation, including twelve months of home confinement, and a $30,000 fine.

On June 3, 2003, the government filed an administrative complaint charging G & T and Tray-Wrap with having "willfully, fragrantly, and repeatedly violated Section 2(4) of the PACA by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities purchased, received and accepted in interstate or foreign commerce" by making payments, through Spinale, to Cashin. *See* 7 U.S.C. § 499p (providing that a regulated merchant is liable for the acts,

omissions and failures of any of its agents and officers). Specifically, the complaint charged G & T with having "made illegal payments to a USDA inspector in connection with four federal inspections of perishable agricultural commodities" between July 1999 and August 1999. It similarly charged Tray-Wrap with having made six illegal payments to a USDA inspector between March 1999 and June 1999. The petitioners responded by filing a joint answer which, in sum and substance, denied the charges against them but admitted that Spinale had been indicted on federal bribery charges and subsequently pleaded guilty to a single count of that indictment.

ALJ William Moran presided over a six-day disciplinary hearing beginning on October 25, 2004, during which he heard extensive testimony from Cashin and Spinale, as well as other witnesses. Spinale testified that he began to make what became customary gratuity payments in 1991, shortly after the petitioners moved to the Hunts Point Terminal market. According to Spinale, he and Lou Guerra, another produce merchant, "were talking and I had just—I don't know if somebody had handed me an inspection or had an inspection, and I turned around and told them that these people up here, they're just impossible to work with. They don't know what they're looking at, you can't get a fair inspection, you can't get a timely inspection, and Mr. Guerra made some kind of signal to me and basically he was going like this here [rubbing two fingers together], and I said, well, you know, look. If I have to do that, I have to do it. So he turned around and said he's going to send somebody to see me and the guy will mention my name and you'll know what you have to do." Spinale testified that he understood

Mr. Guerra to mean that he had to give somebody money "[t]o get a fair inspection or a fast inspection." Spinale further described that "the next time I ordered an inspection, Mr. Cashin popped up, and he turned around and said Lou . . . said that I should [say] hello to you, or something similar to that. . . . [A]fter he finished the inspection, I just turned around and slipped a hundred dollars, just gave him the hundred dollars. . . . I just gave him a hundred dollars, didn't ask him anything, he didn't say anything to me and I didn't say anything to him." Spinale stated that he continued to make cash payments to several inspectors thereafter, including Cashin. However, Spinale repeatedly denied that he had made the payments to induce the inspectors to make inaccurate inspections of the arriving produce.[6] On the contrary, Spinale testified that, as a general matter, he gave the inspectors cash for the sole purpose of obtaining "fair, fast [and] accurate" inspections. Spinale described the inspectors' practice of withholding timely and accurate produce inspections unless they were paid as "soft extortion," and contended that giving in to that "soft extortion" "was something you had to do if you wanted to run a successful business. It was just a necessity."

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6. Spinale did admit that, on at least one occasion-which was caught on tape as part of the sting operation-he "dictated" the contents of an inspection report to Cashin. Spinale explained that "the reason I was dictating these reports was because, in my mind, the man was [in]capable of writing a fair inspection. . . . And I turned around and dictated these reports so that we could get a fair appraisal of what was actually in the car. . . ." At another point in his testimony, Spinale asserted that he gave "in my opinion, what I thought was a correct and accurate report because Cashin wasn't able to do it. He was a nervous wreck."

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Spinale's account was corroborated in several respects by the testimony of Paul Cutler and Edmund Esposito, two former Hunts Point USDA inspectors who, like Cashin, were active participants in the bribery scheme and pled guilty to bribery charges. Cutler explained that there was a chronic shortage of USDA inspectors in the Hunts Point office, and that because of this shortage it sometimes took "a day or two" to perform a requested inspection. As Cutler testified, this situation created a profit opportunity for inspectors willing to "put pressure" on merchants to extend gratuities in their direction: "a lot of times I would come down to do an inspection, like I had applicants would have to sell things, you know—you know, the produce is perishable and they would have to get an inspection in a timely manner. . . . And when we came down there, like I said, they would be yelling a lot and saying where were you, you know. And I would be so ticked off at them, because we have a big load, and here you have an applicant yelling at you, and I would try in some of these stores to say hey, if you want a right inspection, I would tell them to pay me." Cutler was then asked what he would do if a merchant refused to pay him. "If he refused to pay me, it depends on the inspection on—you know, on what defects I found. If it was on the border . . . I would pass it. If he paid me . . . I would add maybe—say it was on the border, I add like two or three percentage points . . . to fail it." Cutler explained that he felt that he had significant power over the merchants in the market because "we could kind of force them to pay to get an inspection, or else they knew they wouldn't get the—a right inspection."

Esposito similarly testified that when Hunts Point merchants refused to pay him, "I usually screwed them."

Asked to elaborate, Esposito stated: "I would adjust the inspection. If they had an inspection that might fail good delivery, I might go in there and change—you know, change the numbers and make sure that it passed a good delivery, and they would not get an adjustment on it. Or I would just change temperatures and make the inspection worthless." Esposito also explained that although as many as "30, 35" merchants were paying the inspectors, not all of paying merchants received the same return on their investments. Instead, according to Esposito, "there were people that paid and you didn't do nothing for them, but they still paid. And then there was people that you did things for that paid, also." Esposito clarified that for the first group "[y]ou just did the normal fair inspection. You gave them a fair inspection and they paid you," but that he would write false inspection reports on behalf of the second group of merchants. Esposito did not explain why the inspectors treated some paying merchants differently than others. Esposito testified, however, that Spinale never asked him to alter, falsify or downgrade an inspection, though he also testified to having given Spinale "a benefit of doubt on inspections" without having been asked to do so because he "got paid and [Spinale is] a nice guy."

Cashin also testified at the hearing. Unlike Esposito, Cashin asserted that Spinale had paid the inspectors for more than just "fast, fair and accurate" inspections. Cashin testified that he and Spinale had an "understanding" that Spinale's payments were intended to influence, and in fact did influence, the outcome of Cashin's inspections. According to Cashin, this "understanding" originally arose from an agreement between Spinale and another USDA inspector,

Bob Snolec, and that when Snolec left the USDA, Cashin took over at G & T and Tray-Wrap, telling Spinale, "I'll be coming here a lot, I think, and, you know, I'll help you like Bob helped you." Cashin did not describe Spinale's response to that statement. Cashin explained that he provided "help" for Spinale and other merchants that paid him illegal gratuities "in any one of three ways, and it's a combination of any one of the three factors. The first factor is increasing the number of containers reported on a certificate. . . . The second way was to increase on the certificate, under the defects, the percentages of condition. . . . And the third way of help was the temperatures recorded on the certificate." By inaccurately recording the quantity and quality of the produce received by the wholesaler, Cashin testified that an inspector could reduce the price that a wholesaler would have to pay a supplier for the produce he had received. Cashin further testified that he would "usually" help Spinale by adjusting the percentage of defects found in Spinale's favor, explaining that Spinale "would be very specific and tell me what he wanted written down," "oftentimes" telling Cashin what to put in his inspection reports, and that when Cashin "helped" Spinale, his inspections did not accurately reflect the conditions of the produce received.

On March 28, 2005, Judge Moran issued a lengthy opinion dismissing the government's complaint against the petitioners. Judge Moran rejected Cashin's claim that Spinale had made the gratuity payments for the purpose of inducing him to make inaccurate inspections, and instead credited Esposito's testimony that Spinale "was paying only for a fair and accurate inspection," also finding broadly that "in all aspects where [Cashin's] testimony conflicted with

Mr. Spinale's testimony, Mr. Spinale's testimony was credible and Cashin's was not." Judge Moran also took note of the substantial economic power that the inspectors wielded over the Hunts Point merchants. As Judge Moran colorfully put it, "Cashin and his cabal of corrupt cronies knew they had merchants like Mr. Spinale over a barrel. The merchants could pay them or risk either a delayed inspection or an inspection which rated produce as acceptable when an honest assessment would determine otherwise." In light of these findings, Judge Moran determined that the payments made by Spinale to Cashin were a "personal fee" extracted by Cashin "for every *visit* to Mr. Spinale's place of business and that in no instance was Mr. Spinale benefitting from those visits [by obtaining] ... an inspection report which downgraded a load of produce from its actual condition." Having found that Spinale did not benefit in this way, Judge Moran declined to extend preclusive effect to the fact or substance of Spinale's admission of guilt to a federal bribery charge, and found that Spinale "was not *bribing* Cashin but that unlawful gratuities were made." To Judge Moran, this distinction was determinative, as he found that a licensee has an implied duty to refrain from paying bribes, but does not bear such a duty to refrain from paying illegal gratuities that do not benefit the licensee. He further found that even if the payment of illegal gratuities constitutes a breach of a PACA duty, the illicit payments that Spinale had made to Cashin did not "constitute sufficient cause to warrant revocation of the licenses of G & T and Tray-Wrap when the central contention of the [Petitioners] is that they were being extorted by the Agriculture inspectors in that, if they wanted an accurate inspection of the produce, they would have to pay off the inspectors to receive one."

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The government appealed Judge Moran's decision to Judicial Officer William G. Jenson who, pursuant to 7 C.F.R. § 2.35(a), is authorized to make final determinations on behalf of the Secretary of Agriculture in adjudicatory proceedings. The Judicial Officer adopted Judge Moran's credibility determinations with respect to the witnesses who had testified at the hearing, and did not explicitly overturn any of Judge Moran's other factual findings. He nonetheless reversed Judge Moran's ultimate decision and revoked the petitioners' PACA licenses, taking a very different view of both the scope of the petitioners' implied duties under the PACA and the circumstances under which extortionate pressure may constitute reasonable cause for the breach of an implied duty.[7]

With respect to the first, the Judicial Officer concluded that PACA licensees "have a duty to refrain from making payments to [USDA] inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of the [USDA] inspection certificates and the integrity of [USDA] inspectors," and that "[a] PACA licensee's payment to a [USDA] inspector, whether caused by bribery or extortion and whether to obtain an accurate [USDA] inspection certificate or an inaccurate [USDA] inspection certificate, undermines the trust a produce seller places in the accuracy of the [USDA] inspection certificate and the integrity of the [USDA] inspector." As such, he concluded that "the purpose and reasons for Anthony

7. The Judicial Officer's order was stayed pending the outcome of this appeal.

Spinale's payments to William Cashin are not relevant to this proceeding. A payment to a [USDA] inspector in connection with the inspection of perishable agricultural commodities, whether the result of extortion evidenced in this proceeding or bribery and whether to obtain accurate or inaccurate [USDA] inspection certificates, is a violation of section 2(4) of the PACA."

The Judicial Officer also rejected the petitioners' claim that the inspectors' practice of "soft extortion" constituted reasonable cause for the payments made by Spinale, concluding that "[t]he extortion evidenced in this proceeding is not a 'reasonable cause' . . . for a commission merchant, dealer, or broker to fail to perform the implied duty to refrain from paying [USDA] inspectors in connection with the inspection of perishable agricultural commodities. Moreover, avoidance of inspection delays and avoidance of the issuance of inaccurate [USDA] inspection certificates are not 'reasonable causes' " for the commission of such an breach. The Judicial Officer offered no further explanation of what circumstances might be encompassed by the term "reasonable cause," however.[8]

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8. We also note that the respondent was not able to point us to any guiding principle articulated by the Secretary with respect to the meaning of "reasonable cause" in its main brief, upon our call for supplemental briefing, or at oral argument. The respondent instead principally defended the Secretary's conclusion by analogizing to the manner in which this Court and others have treated the relationship between bribery and extortion in construing various federal criminal statutes. *See, e.g.*, Respondent's Supp. Br. at 6-7 (citing, *inter alia*, *United States v. Barash*, 365 F.2d 395 (2d Cir.1966)). We need not and do not address the persuasiveness of these analogies here.

Relying on Spinale's repeated admissions that he had made numerous payments[9] to Cashin in connection with Cashin's inspections of agricultural commodities for the petitioners, the Judicial Officer concluded that Spinale, and therefore the petitioners, had "engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA . . . by failing, without reasonable cause, to perform an implied duty arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce." He therefore ordered the petitioners' PACA licenses revoked.

This timely petition for review of the Secretary's decision followed.

II.

A.

The petitioners challenge two conclusions adopted by the Secretary in the course of a formal adjudication conducted

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9. Spinale insisted during his testimony before the ALJ that he did not "pay" Cashin or make "payments" to him, and that he instead "gave" him money, explaining, "I told you, I gave them money which I considered to be soft extortion. I didn't pay anybody to do anything. . . . I didn't pay him, I keep on telling you that it wasn't a payment. It was, as far as I'm concerned, soft extortion." The petitioners pick up on this theme in their opening brief, claiming that the Judicial Officer erred in describing Spinale as having "paid" or made "cash payments" to inspectors when he in fact "gave" them money. Given the Judicial Officer's conclusion that the giving of any money in connection with a perishable commodities inspection violates PACA Section 2(4), we find it unnecessary to address this dispute.

pursuant to the agency's express statutory authority to administer and implement the PACA regulatory regime. *See* 7 U.S.C. § 499a(b)(2) (defining the term "Secretary" as used in the PACA to mean the Secretary of Agriculture); §§ 499d-f (empowering the Secretary of Agriculture to enact a PACA licensing scheme, enforce that scheme, and award damages to persons injured by PACA violations). First, the petitioners challenge the Secretary's generally applicable view that § 499b(4) encompasses a duty to refrain from making a payment to an inspector that only is intended to cause, and does in fact only cause, the inspector to create an accurate and timely inspection report. They argue that because a USDA inspector's duty is to provide timely and accurate inspections, the Secretary's construction is unreasonable. Second, they challenge the Secretary's case-specific determination, unaccompanied by a comprehensive discussion of the meaning of "reasonable cause," that the inspectors' actions did not constitute "reasonable cause" for Spinale's payments. The petitioners claim that Spinale reasonably feared that the petitioners would suffer significant economic loss if he did not pay regular gratuities to the inspectors, and that such a fear must be encompassed by the term "reasonable cause."

We consider both of the petitioners' arguments against the backdrop of the familiar two-step framework set forth by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Under *Chevron*, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as

the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778 (footnotes omitted). As a result, unless we find the Secretary's construction of the statute to be "arbitrary, capricious, or manifestly contrary to the statute," *id.* at 844, 104 S.Ct. 2778, we must yield to that construction of the statute even if we would reach a different conclusion of our own accord. *See Regions Hosp. v. Shalala*, 522 U.S. 448, 457, 118 S.Ct. 909, 139 L.Ed.2d 895 (1998).

It is firmly established that we review under the *Chevron* standard an agency's binding and generally applicable interpretation of a statute that it is charged with administering when that interpretation is adopted in the course of a formal adjudicatory proceeding. *See United States v. Mead Corp.*, 533 U.S. 218, 230 n. 12, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (citing prior Supreme Court cases applying *Chevron* to agency adjudicatory decisions); *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 322 (2d Cir.2000) ("An agency's interpretation of an ambiguous statute it is charged with administering is entitled to *Chevron* deference not only when the agency interprets through rule-making, but also when it interprets through adjudication."). The Supreme Court has indicated that because some "ambiguous statutory terms" can be given concrete meaning only "through a

process of case-by-case adjudication," the individual determinations reached by an agency engaged in that process also "should be accorded *Chevron* deference." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 449, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (citing *Chevron*) ("There is obviously some ambiguity in a term like well-founded fear which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling any gap left, implicitly or explicitly, by Congress, the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program.") (quotation marks omitted); *In re Sealed Case*, 223 F.3d 775, 779-80 (D.C.Cir.2000) (extending *Chevron* deference to the Federal Election Commission's case-specific probable cause determination).

B.

Our task at the first step of the *Chevron* analysis is a simple one, as it is pellucidly clear that Congress has not spoken to the precise issues before us in this appeal: whether a PACA licensee bears an implied duty to refrain from paying illegal gratuities to a USDA inspector, and the scope of the circumstances that constitute "reasonable cause" for the breach of such a duty. 7 U.S.C. § 499b provides that "[i]t shall be unlawful in or in connection with any transaction in interstate or foreign commerce . . . (4) For any commission merchant, dealer, or broker . . . to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with

any [transaction involving any perishable agricultural commodity]." This statutory language plainly leaves undelineated what implied duties and specifications a PACA licensee might be required to bear, and under what circumstances a breach owes its occurrence to a "reasonable cause," and therefore must be excused. It is the province of the Secretary of Agriculture, who as we have noted above, has been charged with implementing and administering the PACA, to fill in these gaps. *Accord JSG Trading Corp. v. Dep't of Agric.*, 235 F.3d 608, 614 n. 8 (D.C.Cir.2001) ("Given the substantial ambiguity in § 499b(4), it is the Department's function, not ours, to define offenses under that provision."). Therefore, in light of Congress' silence, we turn to step two of the *Chevron* analysis, asking whether the Secretary has filled these statutory gaps in a manner reasonably consonant with the language, structure and purposes of the Act.

C.

1.

We affirm as reasonable the Secretary's conclusion that the PACA imposes an implied duty upon licensees to refrain from making payments to USDA inspectors in connection with produce inspections, irrespective of whether those payments induce, or are intended to induce, the inspectors to issue inaccurate inspection certificates. Indeed, given a statutory scheme which assigns government inspectors to protect the financial interests of distant shippers by providing impartial assessments of the condition of the produce upon arrival, *see* § 499n(a); *cf. R Best Produce, Inc. v. Shulman-*

Rabin Mktg., Corp., 467 F.3d 238, 241, 2006 WL 3040061, at *2 (2d Cir.2006) (noting that Congress amended PACA in 1984 to provide sellers with "additional protection"), we can hardly conceive of a duty more clearly implicated than the obligation of recipients not to make side-payments to these inspectors. As the Judicial Officer noted, such payments give rise to a strong inference that the inspector's loyalty has been purchased by the payor, and therefore "undermine[ ] the trust a produce seller places in the accuracy of the [USDA] inspection certificate and the integrity of the [USDA] inspector." The facts of this case do not belie that presumption. Even accepting Judge Moran's conclusion that Spinale made his payments intending only to procure "fast, fair and accurate inspections," the record suggests that Spinale received additional benefits from the inspectors he paid. Esposito testified, for example, that he sometimes gave Spinale "a benefit of doubt on inspections," in part because he "got paid." Cutler similarly testified that he would shade his inspection results to benefit the merchants that paid him. This undisputed testimony tends to confirm what common sense and common experience suggest: that strict impartiality and secret cash payments do not easily co-exist.

Given that a principal purpose of the PACA is to "protect[] ... the producers of perishable agricultural products—most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing," *see* S.Rep. No. 84-2507, at 3, *as reprinted in* 1956 U.S.C.C.A.N. at 3701, we think it is appropriate for the Secretary to construe the implied duties owed by PACA licensees in a manner designed to secure

shippers' confidence in the USDA agents hired, in effect, to stand in their shoes when the produce arrives at its destination. We therefore conclude that the Secretary has permissibly construed § 499b(4) as encompassing an implied duty to refrain from paying illicit gratuities to USDA inspectors in conjunction with inspections of perishable agricultural products, even where those payments are not intended to result, and do not result, in the filing of an inaccurate inspection certificate.

2.

We also affirm the Secretary's conclusion that the inspectors' practice of withholding "fast, fair and accurate" inspections from merchants who refused to pay illegal gratuities does not excuse the petitioners' decision to breach the implied duties owed under the PACA by making such payments. Once again we begin with the statute, which provides that "[i]t shall be unlawful in or in connection with any transaction in interstate or foreign commerce . . . (4) For any commission merchant, dealer, or broker ... to fail, *without reasonable cause*, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any [transaction involving any perishable agricultural commodity]." 7 U.S.C. § 499b (emphasis added). In construing this clause—the expansiveness of which suggests that Congress intended to grant the Secretary broad leeway to address the infinite variety of facts and circumstances that might surround a PACA violation—the Secretary rejected the petitioners' claim that "any violation of the statute was unavoidable due to extortion," instead finding that the "avoidance of inspection delays and

avoidance of the issuance of inaccurate [USDA] inspection certifications are not 'reasonable causes' " for the payment of unwarranted gratuities to a USDA inspector.

We think the Secretary's case-specific determination that "reasonable cause" had not been demonstrated typically would be entitled to *Chevron* deference because agencies are generally accorded *Chevron* deference when they give "ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." *See, e.g., INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999) (internal quotation marks omitted); *In re Sealed Case*, 223 F.3d 775, 779-780 (D.C.Cir.2000) (extending *Chevron* deference to the Federal Election Commission's case-specific probable cause determination). Although such case-by-case adjudication may ultimately be necessary to give concrete meaning to the term "reasonable cause" as used in 7 U.S.C. § 499b, our task in reviewing the Secretary's determination in this case would have been considerably aided had the Secretary provided some guiding principle for identifying what constitutes "reasonable cause," or at least a rationale for rejecting petitioners' alternative construction. However, we need not reach the question whether the Secretary's cursory treatment of the term "reasonable cause" is still entitled to *Chevron* deference, as we would reach the same conclusion as the Secretary under either a *de novo* or deferential standard.

Coercion, as the various hypotheticals drawn up by the parties in their written submissions and at oral argument reaffirm, exists in many degrees and can take many forms. We may presume that there are species of coercion so extreme that they rob an individual of any meaningful opportunity to

resist, as well as varieties too moderate to ever excuse the performance of an illegal act. We need not engage these or other hypotheticals, however, because we have before us a well-developed factual record of the circumstances faced by Spinale. The facts in the record reveal that the "extortion" practiced by Cashin and his cohorts, while real, was indeed "soft" enough to support the view that no reasonable cause existed for the petitioners' breach of duty. Spinale has never suggested that he was physically threatened, and Esposito specifically denied that the inspectors employed such threats to obtain their gratuities. Nor did the inspectors threaten Spinale with the loss or destruction of his business, harm to his family or employees, blackmail, or the outright denial of produce inspections. Indeed, Spinale's payment relationship with Cashin was not even initiated by an inspector's suggestion; rather, according to Spinale's own testimony, he decided of his own accord, at the suggestion of a fellow produce merchant, that it would be worthwhile to start making cash payments to the inspectors, and began to do so at the next available opportunity. We also note Cashin's testimony that while many of the Hunts Point merchants gave in to the inspectors demands, some twenty-five to forty percent of the merchants managed to resist. In the same vein, we note petitioners' concession at oral argument that Spinale never attempted to report the illegal activities at Hunts Point to the Bronx District Attorney's Office, the United States Attorney's Office for the Southern District of New York, the USDA Inspector General, the NYPD, or any other official body. While we need not and do not address whether he bore an affirmative obligation to do so, we simply point out that there were clearly available—and potentially anonymous—means of resisting the inspectors' illegal scheme that Spinale

never explored. We think this fact serves to bolster the Secretary's decision to reject the petitioners' assertion that Spinale had no choice but to make cash payments to the inspectors for over a decade.

In short, we view the record as demonstrating that the inspectors' corrupt practices left Spinale with choices about how to respond to their demands for illegal payments—hard choices, perhaps, but meaningful ones all the same. Given that backdrop, we concur in the Secretary's view that "[t]he extortion evidenced *in this proceeding* is not a 'reasonable cause' . . . for a commission merchant, dealer, or broker to fail to perform the implied duty to refrain from paying [USDA] inspectors in connection with the inspection of perishable agricultural commodities." (emphasis added). We therefore affirm the Secretary's decision to strip the petitioners of their PACA licenses.

III.

We have considered all of petitioners' other arguments and find them to be without merit. Therefore, for the reasons set forth above, the petition for review is **DENIED** and the decision of the Secretary of Agriculture is hereby **AFFIRMED**.

APPENDIX B — DECISION OF THE ADMINISTRATIVE LAW JUDGE DATED MARCH 28, 2005

PACA Docket No. D-03-0026

In re:

UNITED STATES DEPARTMENT OF AGRICULTURE

Complainant

v.

G & T Terminal Packaging Company, Inc.

and

Tray-Wrap, Inc.,

Respondents

DECISION OF THE ADMINISTRATIVE LAW JUDGE[1]

In this administrative disciplinary proceeding under the Perishable Agricultural Commodities Act, ("PACA"), 7 U.S.C. § 499a *et seq.* and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture, 7 C.F.R.§ 1.130 *et seq.* the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, ("USDA") alleges that the Respondents,

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1. This decision is being issued pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary. 7 C.F.R. §1.142.

Appendix B

G & T Terminal Packaging Company, Inc. ("G & T") and Tray-Wrap, Inc. ("Tray-Wrap"), "willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA, 7 U.S.C. § 499b(4), by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities purchased, received and accepted in interstate or foreign commerce." Complaint at 4. If it is determined that the Respondents so violated Section 2(4) of the PACA, the USDA seeks an order revoking the licenses of the Respondents. A hearing was held in New York City from October 25, 2004 through November 1, 2004 before the undersigned federal administrative law judge, ("Court"). For the reasons which follow the Court finds that the USDA has failed to establish the alleged violations of Section 2(4). of the PACA and accordingly the case is **DISMISSED**.

I. THE COMPLAINT

The particulars of the Complaint allege that the Respondents, acting through, in the case of G & T, its president, director and 100% stockholder, Anthony Spinale, made illegal payments to a USDA inspector in connection with four federal inspections of perishable agricultural commodities which G & T purchased in interstate commerce. The illegal payments are alleged to have occurred on July 15, 1999, twice on July 26, 1999 and again on August 13, 1999. On each of those occasions the Complaint relates that Mr. Spinale paid $100 (one hundred dollars) to an Agriculture inspector. In the case of Tray-Wrap, the Complaint alleges that Tray-Wrap, acting through the same Anthony Spinale,

in his capacity as either employee or agent, made illegal payments to a USDA inspector in connection with six federal inspections of perishable agricultural commodities which Tray-Wrap purchased in interstate commerce. The illegal payments are alleged to have occurred on March 24th and March 26th 1999, April 23, 1999, May 20, 1999, and June 16th and June 23, 1999. The Complaint alleges that on each of those dates Mr. Spinale paid $100 (one hundred dollars) to an Agriculture inspector.

The Complaint also relates, in Paragraph IV, at pages 3 and 4, that on October 21, 1999, the same Mr. Anthony Spinale was indicted by the United States Attorney for the Southern District of New York. The indictment included the same facts alleged in this Complaint and the essential charge that Mr. Spinale made cash payments to a USDA inspector. The Complaint then relates that on August 21, 2001, a judgment was entered in the U.S. District Court for the Southern District of New York in which Mr. Spinale pled guilty to a single count of bribery of a public official. The consequence of this plea will be discussed herein.

Appendix B

II. FINDINGS OF FACT[2]

William J. Cashin, (Cashin), the Complainant's first witness at the hearing, was a produce inspector for the USDA, starting in 1979. Most of his duties were performed at the Hunts Point market. Tr. I[3] 66, (10/25/04). His job involved

2. The findings of fact, as set forth in this section of the Court's decision, are based on the record evidence, both testimonial and documentary, and include credibility findings. The Court fully considered the post-hearing briefs and response briefs filed by the parties. If a particular argument from those briefs is not expressly discussed herein as such, it either means that the Court deemed it unnecessary to do so, in light of the matters discussed in the decision or that the Court determined that it was otherwise unnecessary to expressly address it. It should also be noted that the Respondents filed an objection to the late delivery of the USDA's Response Brief to Respondents' Counsel's office. Respondents' Counsel did not receive its copy of the USDA Response Brief until two days after it had been submitted to the Court. As the Court did receive the USDA Response Brief on the date due, there is no basis to conclude that the USDA had an opportunity to review Respondents' Response Brief before filing its own Response Brief. Therefore, as the Court ruled in a conference call with the parties on March 22, 2005, it would not grant Respondents' request that the USDA Response Brief not be considered. Accordingly, all the post-hearing briefs filed by the parties were considered by the Court.

3. The hearing began on 10/25/04 and lasted six days. The transcript however does not list the pages sequentially for the entire hearing. Rather, for each day, the transcript begins with page one. Therefore, except for the first reference to a given day, which will include the date, rather than repeating the date for each reference, this decision will refer to each day of hearing with a sequential Roman Numeral followed by a page number. For example, references to

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visiting wholesaler locations and performing inspections based on USDA standards and documenting his observations. The inspection document is referred to as an "inspection certificate."[4] Tr. I 67. The purpose of the inspection is to

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testimony for the first day, 10/25/ 04, will be noted as follows: "Tr. I," followed by the applicable page number and, accordingly, the last day's transcript references will appear as: "Tr. VI," followed by the applicable page number. The Court asked the parties to submit transcript errors to it and they did so. However, USDA did not appear to appreciate the fundamental premise that transcript errors refers to *errors* made by the Court Reporter because several of its "Proposed Corrections" involve amending the transcript to have it read as USDA would have liked it to appear and in those instances the transcript is not in error. For example, at Tr. I 35 USDA proposed that the words "On April .." be deleted. The problem is USDA counsel said those words and therefore there was no transcript error. For that reason, each of the objections raised by Counsel for Respondents are sustained by the Court. In contrast, where errors noted by USDA were typographical *errors*, the Court, as well as Respondents' Counsel have no issue with such corrections and those typographical errors are incorporated by reference. *See* Complainant's Proposed Corrections to the Transcript, an undated five page document received by USDA OALJ/OHC on January 7, 2005 and Respondents' Response to "Complainant's Proposed Corrections to the Transcript, which is also undated but received by the Court on February 22, 2005, and which is also incorporated by reference. Accordingly, while typographical and/or spelling errors are accepted, efforts to edit what the witnesses, the attorneys or the Court stated in the transcript may not be revised.

4. The inspection certificate is also known as the FV-300. Tr. I 132. It is the "formalization of all of the information [the USDA inspector] gather[s] into the document ..." Tr. I 72. After noting

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provide a picture, in words, of what the produce looked like. There are two basic types of defects: quality and condition. Tr. I 71. Quality defects are defects that existed when the product was packed or when grown and so they do not change. For example a product may be 'misshapen' which is a quality defect. In contrast, condition defects do change. Examples of condition defects are decay or rot. Tr. I 71. Inspections for produce[5] are not mandatory. Instead, wholesalers call the USDA and request an inspection. A fee is charged for these inspections. Tr. I 68.

Cashin began inspecting produce at G & T in 1979 when he was a trainee. He stated that G &T and Tray-Wrap were day operations.[6] By 1983 or 1984 he was regularly inspecting

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essential information such as the name of the firm, the commodity being inspected, date and time of the inspection request, the inspector looks at the product and "run[s] samples." Cashin would examine specimens and determine simple percentages, calculated by weight or by count. Upon noting defects he would arithmetically determine the percentage of defects found. Tr. 170.

5. There are different types of inspections. Some products, (i.e. commodities) have "grades," that is USDA grade standards. Quality, which is also referred to as "grade," and condition are evaluated too. Some products don't have grade standards; they are rated by condition only. Tr I-67. A grade standard for produce refers to the standard established by Congress for particular products. For example, for a particular product to be listed as U.S. #1, it would have to meet certain established requirements. Tr. I 71.

6. Generally Hunts Point opens for business around 10 p.m. Tr. I 202. G & T and Tray- Wrap, by contrast, were daytime operations. Tr. I 202.

G &T and Tray-Wrap.[7] Tr. I 72. As time went on, around the mid-1980's to about 1990, he was inspecting G &T and Tray-Wrap "almost every day." Tr. I 73. Cashin's contact at both facilities was Mr. Spinale. Cashin did not know what Mr. Spinale's position was with either of these concerns, although he assumed he was their owner and buyer. Tr. I 74. In any event, it was Mr. Spinale who requested the inspections and the person who would point out the products he wanted inspected. As Cashin put it, "[h]e was the person who would say 'Well, I looked at this and I saw these problems here, there." Tr. I 75.

Cashin stated that Mr. Spinale gave him money in connection with Cashin's inspections at G &T and Tray-Wrap. He added that those payments were not for the fee that the USDA charges to do those inspections because those fees were collected through a bill sent to those companies. Tr. I 77. Cashin stated that the money Mr. Spinale gave him "was for helping him on the various inspections." Tr. I 79. Originally, the amount he would receive was $100.00 *per visit* but after G & T and Tray-Wrap relocated to Hunts Point, the amount was $100.00 per inspection. Tr. I 79 - 80. These payments began "when [Cashin] first started [doing inspections] on [his] own, [which was] around . . . 1983 or 1984." Tr. I 80. These payments continued until Cashin left, having been arrested for his corrupt practices in 1999. Tr. I 80. Typically, after Cashin had completed his inspections, Mr. Spinale would motion for him to come over to a remote part of the warehouse and then hand him money, adding only "Here, hold on to that" when he would do so. Tr. I 80, 93.

7. G & T and Tray-Wrap were both located at Hunts Point and both those names appeared together on the office door there. Tr. I - 76.

Cashin said he knew that he would receive money every time he visited Mr. Spinale. He acknowledged getting paid whether the inspection graded as U.S. Number one or not. Tr. I 81. To the question whether there was "some sort of understanding that [he] had with Mr. Spinale," Cashin stated: "Originally, it was an understanding that [Cashin] was helping him, and then later on, [Spinale] was just still paying. I don't — that I don't know."[8] Tr. I 81.

Explaining the background of this arrangement's origination, Cashin stated he was first trained in his job by Bob Snolec [ph]. This occurred around 1979 or 1980. Cashin told Snolec he (Cashin) "was taking money in the market from some of the wholesalers . . ." Snolec revealed he already knew this about Cashin, as some of the wholesalers had told him. As Cashin related it, Snolec then told Cashin "'Tony is okay. He's a good man. . . . Work with him, help him out, and he'll take care of you,' which meant that he would give

8. Cashin was surprisingly vague when asked about his conversation with Mr. Spinale regarding their understanding. He could not recall what Mr. Spinale said to him in the alleged conversation, nor specifically what he said to Mr. Spinale. Tr. I 146. Cashin asserted this conversation occurred "about 1983." Nor could he remember how long he had been dealing with Mr. Spinale prior to the momentous conversation. Tr. I 147. The Court observes and finds that Cashin's words, that he was "helping" Mr. Spinale is not the equivalent of asserting that he altered, that is, downgraded, a produce inspection from its true condition. Nor, the Court observes, has USDA demonstrated a single instance when Mr. Spinale was involved in a produce inspection which downgraded produce and made it appear in poorer condition than it really was. Perhaps the best summation from its star witness, Cashin, regarding the purpose of the payments was his acknowledgment, "I don't know." Tr. I 81

me money, of course." Tr. I 82. Cashin also told Mr. Spinale ". . . I'll be coming here a lot, I think and, you know, I'll help you like Bob helped you." Cashin defined "help" as increasing the number of containers reported on the certificate to closely reflect what was actually manifested. This was due to the fact that some of the packages may already have been sold by the time the inspector arrived.[9] Thus, the certificate would overstate, and thus not accurately reflect the amount of product that the inspector viewed[10] during the inspection. Tr. I - 87. "Help" also included "to increase on the certificate, under the defects, the percentages of condition — usually the condition defects to closely — to go over the good delivery standards. The 'good delivery' standards are a parallel set of standards within the produce industry, along with the USDA standards[11]." The last way "help" was

9. Cashin amplified this explanation stating, as an illustration, that if a manifest reflected 1,100 items but the wholesaler had sold a few hundred of the items, the wholesalers would want the certificate to reflect 1,100 items, not 900. Thus, if 10% decay were found, the wholesaler could tell the shipper the 10% decay applied to 1,100 items. In this way, the wholesaler would get a credit on the whole shipment of 1,100, not just on 900 items. Tr. I 87.

10. As alluded to, this doesn't completely tell the story. Due to delays in inspections and the fragile nature of produce, it was common for merchants to sell off some of a load while awaiting an inspection. There is no evidence in the record to suggest anything other than that this was a widespread and unofficially sanctioned practice in this USDA office.

11. Cashin added that these good delivery standards were set a bit higher than the USDA standards. He believed this was done to provide some room between the USDA standards and the actual arrival. Although he "never did understand what it was all about," (Cont'd)

provided was in the temperatures recorded on the USDA certificate. Cashin explained that produce is shipped at fairly cold temperatures but that once the shipping container is opened, the temperatures will rise. If the temperature goes above the industry accepted level, then the blame for product deterioration is shifted from the carrier to the receiver or wholesaler. Thus, receivers or wholesalers do not want a certificate to reflect a temperature above the industry accepted level. Tr. I - 84. Cashin stated that if the certificate reflected a higher percentage of condition defects affecting good delivery standards, then the wholesalers could renegotiate the prices with the shippers and in some cases get money back if more deterioration in the product was reflected in the certificate. Tr. I - 85.

Although Cashin stated that the money he received from Mr. Spinale influenced his inspection findings, the specifics he offered were hardly damning. Cashin stated Mr. Spinale would say to him: "Look at these potatoes[12] over here. They

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he thought wholesalers wanted the numbers reported on the USDA certificate to be just above the "good delivery standards" so the wholesalers could re-negotiate the prices with the shippers. Tr.I.-84. **It is of particular importance to note here that Cashin *never* directly asserted that he increased the percentage of defects *for any specific load of produce that he inspected for Mr. Spinale.***

12. Cashin testified that potatoes, along with other types of produce, were traded on the futures commodity exchanges. When he started as a USDA inspector potatoes were traded on the Mercantile Board, but this business practice was discontinued shortly after Cashin was no longer a trainee. The potatoes would arrive at

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have a lot of problems." Cashin would then look at a few bags and then the two would talk "[a]nd *if the load had problems* and we came up together or separately with a — with some problem, usually together, then I would write it as such." Tr. I 88. (italics added). Cashin stated that Mr. Spinale would pay him "cash to *inspect* produce . . . *every time* [he] went there." Tr. I 88.

Cashin admitted that he had a role in the investigation that led to the criminal indictment of Mr. Spinale. Tr. I 88, 89. On March 23, 1999 Cashin was arrested and charged with bribery and conspiracy to commit bribery. Tr. I 89. He decided to cooperate with the FBI and the Department of Justice. They requested him to wear a 'wire' (i.e. a secret recording device) under his USDA outfit. He used this to record his conversations with the wholesalers when he went to work at the Hunts Point market. He would then hand over the tapes and any money received from the wholesalers at the end of each day and review his day's activities. Later on, in May 1999, he was fitted with a video tape device.[13]

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the New York Food Auction where, in order to be eligible for sale, they had to be evaluated as U.S. Number 1. Tr. I, 118. Cashin also agreed that Mr. Spinale had loads from the Mercantile Exchange. In fact, Cashin stated that USDA Regional people would come to the exchange when potato loads were being inspected "*to make sure they passed*" For obvious reasons, Cashin agreed that such a practice would be in violation of the certification on the Inspection Certificate. Tr. I 121.

13. This device was concealed in a canvas bucket that he carried to the inspections. The bucket contained various booklets and tools

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Tr. I 89, 90. Cashin's surreptitious assistance to the authorities continued until August 1999. Thus, he was at Hunts Point with a video camera from about the second week of May through the middle of August. Yet, despite three months of this activity, no recordings were introduced at the hearing of his interactions with Mr. Spinale.[14]

When directed to CX 1, at pages 3, 4, Cashin asserted the document was an "FBI 302." Tr. I 96. Cashin stated that the FBI agents prepared these but that he had input into their content. He recounted that he met with the FBI agents on days he received money from wholesalers and he would review his day with the agents. The agents would take notes during these reviews. After that Cashin "***guess[ed*** that] they went back to their office, and they drew up the 302 document." Tr. I 97 (emphasis added). When asked about CX I- 4, which referred to "SOURCE," Cashin asserted that this referred to him. Tr. I 97, 98. As an evidentiary matter, the Court will explain herein the significant legal problems with the claims of Cashin regarding the 302s.

The Court observes and finds that there were enormous infirmities, as a matter of proof, that Cashin was the 'source' referred to in the document. For example, when directed to

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he would employ during inspections. The federal authorities fitted a camera in the bottom of the bucket. As with his recordings, Cashin would turn in his videos on a near daily basis. Tr. I 91. It is of note that no audio or videotapings were presented in this administrative proceeding.

14. Nor were any recordings introduced of Cashin's interactions with anyone in this matter.

pages 3 and 4 of CX 1, which are the 302's associated with that exhibit, it was noted by the Court that Cashin's name does not appear. Cashin had no answer to the observation that his name is nowhere identified as the 'source.' Although Cashin did note that the 302s listed Hunts Point market and Tray-Wrap, he admitted he was *not* the only inspector that inspected Tray-Wrap during that period of time. Tr. I 101. Therefore, from the face of those documents there is no way to discern that Cashin is the source referred to in those pages. While the inspection certificate refers to an inspection at Tray-Wrap at 1:30 p.m. on March 24, 1999, the 302 does not mention a time, nor does page 3 of CX-1 appear to be in sequence with page 4 of that exhibit, as page 4 starts with "(3)," but the preceding page does not list a (1) or a (2). Tray-Wrap's name does not appear on page 3 of CX-1 either. Large sections of these pages, particularly CX-1 at page 3, were in a redacted form. While the exhibit was, by stipulation, admitted, this does not overcome its probative infirmities.[15] Clearly, the USDA Counsel needed to have an FBI witness testify as to these matters, but they did not do so, either in their case on direct nor, though specific opportunity existed to do so, in any rebuttal evidence. This is, after all, a legal proceeding and while in a casual setting one might 'deduce' each of these answers, such a practice does not satisfy the

15. USDA counsel's reliance on the stipulation to the admissibility of the 302's represents naivete or ignorance of the effect of the stipulation. True, the parties agreed that the 302's were authentic 302's and they represent what they state they are, but that does not mean that their admissibility proves more than the terms of the stipulation. USDA counsel failed to perceive the difference between, on the one hand, admissibility and, on the other hand, the *weight* to be afforded to the documents. As noted, the deficiencies in the 302's are explained herein.

government's proof obligations in a hearing. The document is offensive in other respects as well. For example, it characterizes the $100 payment as a "bribe." Of course, this goes to the heart of the Respondents' contentions regarding exactly what was transpiring here, as the Respondents' position is that, effectively, Mr. Spinale was being 'held-up' by these corrupt, convicted USDA inspectors. Confirming the problems with this exhibit, when the USDA attorney attempted to rehabilitate Cashin, by asking if the inspection certificate (CXI, at page 5) was an accurate representation of Cashin's inspection at Tray-Wrap on March 24, 1999, Cashin responded: "**I don't remember**." Tr. I 104. Further, Cashin first saw CX1, pages 4 & 5, only when he prepared for the criminal trial. Therefore, his review of the document was in a time frame **several years after** 1999. Tr. I 105. Cashin acknowledged that the FBI ***never*** provided him with a typed copy of this report nor did it ever ask him to look it over for accuracy, either shortly after it was created or, for that matter, ever. Cashin agreed that, other than surmise, he had no independent basis for knowing that he was the only individual working for the FBI and no independent basis for knowing that the report is referring to him when it refers to a visit to Tray-Wrap on March 24, 1999. Tr. I 106. Accordingly, for all these reasons, no probative weight can be afforded to pages CX 1 at 4 and 5 of this exhibit. Other deficiencies with the 302's existed and these will be discussed *infra*.

Cashin also asserted that he was the source for the *other* 302s in the record.[16] Tr. I 98. However, the Court finds that

16. A 302 is associated with each of the dates cited in the Complaint. The problems identified by the Court with the 302 associated with CX 1 are endemic to the 302's for each of the government exhibits, CX 1 through CX 9.

the fatal infirmities described with the 302s in CX 1 were present for each of the 302s. Cashin claimed that the incidents related in the form 302 appearing in CX 1 were an accurate reflection of the events that took place at that time. Tr. I 98, 99. Regarding this exhibit, Cashin stated that, on March 24, 1999, he inspected a load of tomatoes for Tray-Wrap and that Mr. Spinale gave him $100.00 in cash. Tr. I 99 and CX 1-5, Inspection Certificate # K-678086-0. The USDA inspection fee was $66.00 and Cashin related that the fee was apart from the $100 he received from Mr. Spinale. Tr. I 100.

Cashin was next directed to CX 2. As mentioned, it is accurate to state that the same infirmities identified above with respect to CX 1 existed for CX 2 as well. Cashin, in response to questions from USDA counsel, noted similarities between the information contained in pages 3 and 4 of CX 2 (i.e. the 302's) and page 5 of that exhibit (the inspection certificate bearing his signature). Tr. I 108. However, when asked by counsel for USDA whether the cash Mr. Spinale paid him in connection with the inspection reflected on Inspection Certificate K-678091-0 "influence[d him] in *any way*," he responded: "*I don't remember.*" (emphasis added) Tr. 1108. In apparent recognition of the problem he had before him, Counsel for USDA did not spend long with CX 2 and when he moved to CX 3, he tried to adjust to this dilemma by asking Cashin "[w]hat transpired, *according to the 302*, on that day?" (emphasis added). *Reading* from the 302 report, and decidedly *not* relying on his own memory, Cashin reported that he went to Tray-Wrap, inspected a load of tomatoes, and was paid $100 by Mr. Spinale. **But when asked if the S100 influenced his inspection, Cashin again**

could only state: "*No, I don't remember*." (emphasis added) Tr. I 109. It bears repeating that, as with CX 1 and 2, the same fatal evidentiary deficiencies were present for CX 3.

Still, on direct examination, Cashin maintained that the money from Mr. Spinale did influence his inspection results. He claimed that usually this influence was reflected in the percentage of defects found. He asserted that Mr. Spinale would be "very specific and tell [Cashin] what he wanted written down or just made worse than what I actually found. Sometimes he would want it written exactly [as Cashin had] found." Tr. I 109-110. However, it is significant that when he was directed to the *particular inspection* under discussion in his testimony, he was asked if he could recall "which way he asked [him] for help?" Cashin's response was: "*No, I can not.*" (emphasis added). Tr. I 110. **The Court notes again that this is a legal proceeding. Thus, Mr. Cashin's *general assertions* that Mr. Spinale attempted to influence the percentage of defects found in inspections may be of interest to non-lawyers but they do not speak to the specific allegations in this Complaint, which is after all what this proceeding is all about. The Complaint alleges *specific* "Bribes" on *specific* dates and that is what the government is obligated to prove by a preponderance of the evidence. Therefore, even apart from his lack of credibility, Cashin's general anecdotes about other, unidentified, inspections and Mr. Spinale's alleged attempt to influence such inspections do not advance the USDA's case an inch.**

The evidentiary problems noted above continued as Cashin proceeded with his testimony for the other exhibits.

When directed to CX 4, he related that he visited Tray-Wrap on May 20, 1999 and upon inspecting a load of tomatoes, Mr. Spinale paid him $100.00. Tr. I 110. Similarly, when asked about CX 5, he stated that on June 16, 1999, he inspected a load of tomatoes at Tray-Wrap and was paid $100 by Mr. Spinale. However, Cashin was merely reading from the 302s; independently he remembered nothing. Counsel for USDA, despite the evidentiary problems noted above with each of the FBI 302 reports, continued to indirectly reference those reports as he moved through the direct examination of Cashin. *See* Tr. I 111. Still, the 302 problems continued to plague the government's case. For example, while Cashin in referring to his June 16, 1999 inspection at Tray-Wrap recited from the 302 of receiving $100 from Mr. Spinale, the 302 states on one page that $200 was received, but the next page refers to $100. *See* CX 5, pages 4 and 5, Tr. I 111,112. Again, it bears emphasizing that it was clear from his testimony that Cashin had no independent recollection of this event or any of the others. When asked to explain the discrepancy in the amounts, the best Cashin could do was to again recite what was listed in the 302. Tr. I 112, 113. *In fact, when asked specifically if he had any independent recollection, Cashin admitted he did not.* Tr. I 113. Significantly, Cashin affirmed that the first time he had ever viewed that document, or any of the other 302s, was "*a couple of years later*" after they had been prepared. Tr. I 113 (emphasis added).

As the government plowed through its exhibits, none of the exhibits escaped the deficiencies noted above. When it moved to CX 6, involving a June 23, 1999 inspection of tomatoes at Tray-Wrap and three loads of potatoes, Cashin stated that he received $400 from Mr. Spinale. But, as with

the others, Cashin was simply reading from the 302s to support his testimony. For obvious reasons, the inspection certificate, which is the only document Cashin himself prepared, makes no reference to alleged payments.[17] Thus, as with each of these exhibits, Cashin was merely reciting, robotically, the information contained on the largely redacted 302s, which 302s he had never viewed until *years* after their creation. Understandably, the government spent ever decreasing time in its direct examination of these exhibits. For example, when examining Cashin with regard to CX 7, only a half-page of transcript was involved with that five-page exhibit.

Without intending to belabor the point, but for the sake of completeness, the Court notes that Cashin's testimony for CX 8 was also based solely on the 302s. When asked by government counsel where he was getting the information for his testimony, Cashin stated it was from: "Page four . . . [the] first page after the redaction." Tr. I 118. Thus, it is accurate to state that, in terms of the various 302s in the record, the use of Cashin's testimony about these documents was of no greater value than would have been provided if it had been derived from the testimony of a stranger plucked randomly from a city street and brought in to read the content of those 302s. To cite yet another example, when Cashin claimed that, when viewing the load of potatoes, Mr. Spinale wanted that inspection to be consistent with previous inspections of that load, when asked, on direct, how he knew the loads had been previously inspected, he answered:

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17. For informational purposes, it is noted that CX 7-5's reference to BNFE 18602 refers to the number on the Burlington Northern Food Express railroad car. Tr. I 117.

"It said so in the 302." Tr. I 119. Making matters worse, and further diminishing his testimony, Cashin then retreated from his assertion that the load had been previously inspected. He then lamely stated that he needed glasses and that, upon *rereading* the 302, he stated that the loads were similar, not previously inspected.[18]

Regarding CX 9, which relates, at least in part, to the one count that Mr. Spinale pled guilty, Cashin stated that he went to G & T on August 13, 1999 and that Mr. Spinale gave him "some going away money ... $100 cash for the inspection." Tr. I 125. Cashin made it clear that his testimony regarding this assertion came from the 302, specifically identifying CX 9 at page 15. Tr. I 125. When pointedly asked by the Court if he had an independent recollection that he received $100 for an inspection on August 9, 1999,[19] Cashin admitted it was true he had no such recollection.[20] Tr. I 126.

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18. Cashin stated that, among the corrupt inspectors, for consistency it was their practice when the same shipper sent the same commodities in multiple shipments in sequential days, the inspectors would consult the previous days' inspections so that their results would not conflict.

19. While the Court did, mistakenly, state "August 9, 1999," Cashin was testifying abut his August 13, 1999 inspection. The Court's misstatement of the date is understandable and only serves to underscore the problems with these 302's. This is because this 302 starts off with an August 13, 1999 date but then proceeds to list the date on subsequent pages as August 8, 1999. *See* CX 9, at 13, 14, 15.

20. The best Cashin could independently recall was that he received "thank-you money" from Mr. Spinale around the time he left the USDA inspection service. He could not state the amount he assertedly received. Tr. I 126, 127.

Cashin, referring to CX 9 at page 16, did identify his inspection certificate for a load of potatoes at G &T, which reflected an August 13, 1999 inspection date. Cashin noted that handwritten notes on the certificate reflected paragraphs relating to freezing, that the railcar had been previously inspected and a restriction explaining the limits of the inspection. Tr. I 128.

USDA Counsel asked Cashin, regarding CX 1 through CX 9 if his inspection certificates were "accurate representations of the commodities as [he] saw them on those days?" Cashin stated they were not in that "[b]ecause [Mr. Spinale] paid me bribe money, some of them *could've been* altered to his benefit." Tr. I 129 (emphasis added). Apparently referring to CX 9, Cashin stated that any one of the three factors (the number of containers, the percentages above the good delivery standard, or the alteration of temperatures) *could have* been changed. Tr. I 129. In this regard, one thinks of John Adams remark: "Facts are stubborn things; and whatever may be our *wishes*, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence." *Bartlett's Familiar Quotations*, Sixteenth Edition, 1992, 337-15. (emphasis added). In short, Cashin's "*could haves*" do not satisfy the burden of proof.

Significantly, Cashin himself discounted the worth of his own testimony. When directed to the inspections reflected in CX 1 through CX 9 and asked if those reflected the only payments Mr. Spinale ever gave him, he answered: "Other than the thank-you money when I left, over the years, I remember him giving me Christmas money on occasion. *I don't remember much.*" Tr. I 130. (emphasis added). In an

attempt to repair the response, USDA Counsel then asked ". . . over the year, was he paying you for various inspections as well?" To this, Cashin replied: "Yes, he was."[21] Tr. I 130. Cashin's direct examination ended with his self-serving assertion that he never *told* Mr. Spinale that he would not help him if he did not pay money for the inspections and that he never suggested or led him to believe that he would not help him if Spinale did not pay him. In fact, that recounting overstates his response because Cashin was only responding to those questions from the USDA and could only muster for them the unelaborative answer of a simple "no" to them. Tr. I 131.

It is also important to note that Cashin, in responding to questions about CX 1 through CX 9, while asserting that some, *unspecified* Inspection Certificates were inaccurate in terms of reflecting the true condition of the products he inspected, also conceded that some *were accurate*. As an example, he referred to the certificate he wrote on August 13, 1999, as reflected in CX 9, at page 16, noting that this would reflect an accurate report because the product would be inspected subsequently by the railroad's own inspectors. As Cashin put it, "I don't believe that this inspection [CX 9, page 16] has been altered, because the railroad's going to

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21. Even this attempt to rehabilitate made no headway. Remembering that this Complaint charges specific dates of alleged bribes, as the question from USDA counsel was a completely general question it did nothing to address those specific dates. Further, Cashin's response skirted the central contention of the Respondents that they were paying the corrupt inspectors because they had to in order to get timely and accurate inspections.

come behind me and inspect it." Tr. I 134. But Cashin's example of an accurate inspection hardly helps the USDA's case.[22]

More significantly, when referring to all of the certificates, CX 1 through CX 9, which certificates, being the basis for the Complaint, form the heart of the government's case, *Cashin agreed it was fair to state that he could not state which of those certificates were accurate from those that were inaccurate.* **Thus, for any particular exhibit, Cashin had no idea at the time of his testimony in this proceeding if he was looking at one of the 'accurate' ones or an alleged inaccurate one.** Tr. I 134,138. **Restated, he conceded that he had no independent recollection of the events and was relying *solely* on the 302 reports.** Tr. I 137. *Accordingly, he conceded that any of them could have been altered but any of them may not have been altered as well!* Tr. I 139,140. *Those reports, it should be recalled, were never reviewed by Cashin for accuracy at any time near when they were made and, in fact, he never laid eyes on the reports until years after their creation.*

As a further example, Cashin also agreed that, as the inspection reflected for CX 5 at 6, this was an inspection for condition only, and no grade defects were listed on the certificate. He conceded that if grade defects had been listed on that certificate, (CX 5 at 6), it possibly would have helped Tray-Wrap because the "checked sum" for the total number of defects found would have been higher. Thus, if grade defects had been included, Tray-Wrap would have been able

22. It is also worth noting that by Cashin's own testimony, this single count to which Mr Spinale pled guilty (i.e. CX 9) was an accurate inspection certificate.

to claim a bigger allowance from the shipper. Cashin also agreed with counsel for the Respondents that, while he stated that increasing the number of containers reported as present in a load was a means to help a wholesaler because it would allow the wholesaler to claim a bigger allowance, his inspection, as reflected in exhibit CX 1, at page 5, did not follow that approach as Cashin's certificate reports that he inspected only 1/4 (one quarter) of that load.[23] Tr. I 145. Beyond that, Cashin conceded that he never knew if G &T or Tray-Wrap ever received an allowance from a shipper in connection with any inspection certificate he issued. Nor could he recall ever hearing that such an allowance had been received. Tr. I 198.

Further, Cashin characterized Mr. Spinale's knowledge about potatoes and tomatoes as "extensive," agreeing that Mr. Spinale *was an expert* regarding those products. Tr. I 147, 148. Elaborating, Cashin stated that this expertise of Mr. Spinale extended to identifying defects, bad conditions or problems with those products, as well as to their *marketability*.[24] Cashin also

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23. Exhibit CX 5, at page 5 reflects the number of containers as 400 cartons.

24. It is noteworthy that Cashin *volunteered* the last characterization about the scope of Mr. Spinale's expertise, by adding that it included the subject of the *marketability of potatoes and tomatoes*. The question posed had only asked about Mr. Spinale's expertise regarding defects or bad conditions, yet Cashin felt this distinct aspect of expertise needed to be included. In fact, while Cashin maintained that Mr. Spinale was not an expert in terms of *writing* USDA inspection reports, he admitted that Mr. Spinale had "very good knowledge" regarding "what percentages were allowed and what percentages weren't allowed [by] the USDA as far as potatoes and tomatoes. . . ." Tr. I 149.

agreed that Mr. Spinale was knowledgeable as to the various types of defects in potatoes[25] and would be able to recognize them. Tr. I 153. In fact, Cashin allowed that Mr. Spinale *knew more than most inspectors about potatoes* and knew how to distinguish grade defects from other defects.[26] Tr. I 153, 155.

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25. Potatoes can have defects and, because of tolerances, still be classified as USDA number one. These allowable defects permit 5% external grade defects, 5% internal defects and "a restricted 1% tolerance for soft rot, but the total internal/external defects can not exceed 8%. Tr. I 158,160. Thus, for example, if external grade defects exceed 5%, then the load would be out of grade one. By comparison, tomatoes can have quality problems involving their shape or scarring. Insect damage can also be an issue. Tr. I 160. Like potatoes, there are percentage limits for problems. Cashin was uncertain, but it was his recollection that tomatoes had a 10% total defects allowable. This was composed of 5% for serious damage and 5% for softness and decay. Thus if softness and decay totaled 6%, the tomatoes would be out of grade. Cashin also believed that a consignee has the right to reject a load form the shipper if the product is out of grade. Tr. I 161.

26. Cashin testified that the USDA information binder addressing problems that can exist with potatoes was large. Potato defects can include soft rot, black leg and freezing; such defects are scored on sight. Other defects, such as lenticels, which are small white or dark specks on the surface of the potato, are scored on the percentage of the surface which is affected by the defect. Still other defects, such as *fusarium tuber rot* are scored on the basis of the amount of the potato that would be considered 'waste' upon cutting it up. By contrast a misshapen potato reflects a quality factor. *However, despite the large guideline notebook, Cashin emphasized that "all inspections . . . [are] a rather subjective process."* Tr. I 150,152. Cashin also agreed that, because the process is very subjective, two inspectors could look at the same load and reach

(Cont'd)

Appendix B

In terms of evaluating the quality of a load of potatoes, Cashin agreed that Mr. Spinale's judgment could be counted on by an inspector. Tr. I 157. Cashin also agreed that many times he wrote up accurate inspections for Mr. Spinale. Tr. I 195, 196.

Cashin also conceded that he first starting taking cash payments at "some time in 1980," which was *less than a*

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different conclusions about the load. Thus, two inspectors, viewing produce under identical conditions could honestly arrive at different conclusions. Tr. II, 10/26/04, 95, 96. In fact, such inspectors could arrive at *significantly different ratings*. Tr. II 96, 97. Further, Cashin conceded that if he were to view a load of potatoes and found 8% grade defects, he would not be permitted to write up his inspection listing 8% defects in the load, because USDA policy did not allow that. Tr. I 188,189. The procedure called for an inspector to call the USDA office in such a situation. This existed because in such circumstances the USDA would want to determine if the load in question had been previously inspected at the shipping point. If it had been previously inspected at the point of its shipping origin that would create an appeal situation. Tr. I 189,190. The import of Cashin's testimony was that he would have to continue to take samples in an instance where there had been a previous inspection by the state so that, at the end of the day, the samples would arrive at an allowable grade and thus be consistent with that earlier inspection. See Tr. I 190, 192. Thus, Cashin agreed that if he came across a load of potatoes with 8% grade defects, the Officer in Charge would instruct him to continue taking samples until the percentage defects fell to under 5%. Tr. I 194. Consequently, Cashin agreed that, although his inspection would ultimately reflect 5% defects, *it would not be accurate*, as he had found, in fact, a higher percentage of defects, but was following the instructions from his supervisor. Tr. I 194.

year after he started as an inspector.[27] Tr. I 162. It is upon the credibility of this nineteen-year veteran cash-taking inspector that the USDA rests its entire case against a man who, prior to these charges, had a spotless record.[28] Cashin admitted that during entire nineteen years he was employed as an agriculture inspector, other USDA inspectors working at Hunts Point took cash payments as well. Tr. I 161,162. Cashin stated that during the period of taking cash payments he met with other cash-taking inspectors. Tr. I 165. Working together, at times the crooked inspectors would pick up cash payments at the Hunts Point merchants' houses for other inspectors who formed the corrupt network.[29] Tr. I -165.

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27. Cashin testified that his illegal activity began in 1980 when inspecting a load of leaf lettuce for another produce company. That load involved a "dump certificate," which is a separate certificate declaring that the produce was so poor that it was not sellable. These dump certificates are not used anymore because it involved the USDA evaluating that a load had no commercial value, a conclusion it now avoids expressing. When he arrived for the inspection the produce wholesaler asked him to inflate the number of boxes of bad lettuce. Cashin did so and later received a cash payment for cooperating. Tr. I 163, 164. While the produce wholesaler instructed him to "stop by and see [him] later," Cashin knew he would be receiving money for his corrupt action. Tr. I 164.

28. To avoid any miscommunication, when the Court states that Mr. Spinale had a prior spotless record, one should not claim that the guilty plea stains that history, as it stemmed from the same alleged events identified in the administrative complaint.

29. Cashin qualified this response, stating that this arrangement between the inspectors to pick up each others cash payments, *did not apply to his dealings with G & T or Tray-Wrap.* Tr. I 166. Elaborating on the arrangement between the inspectors to pick up

(Cont'd)

Appendix B

Regarding the day of his arrest, March 23, 1999, Cashin admitted that he was frightened when the FBI arrested him, charging him with bribery and conspiracy to commit bribery.[30]

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each others cash payments, Cashin stated that, in the early 1980s, USDA inspector Dan Auserry [ph] approached him regarding payments from Hunts Point wholesaler Post and Taback. Auserry told Cashin that Post & Taback wanted to "work with him" but that Auserry would have to be the middle man, and in that role would pick up payments intended for Cashin. Cashin described Auserry as "the leader of the group." Tr. I 174. The same arrangement was established for Fruitco Corporation, another Hunts Point wholesaler. As Cashin explained it, Fruitco wanted "to make product move faster . . . [and so he] want[ed] to work with [the corrupt inspectors]." Tr. I 170. Other houses were involved as well. For Rubin and Brothers Produce, USDA inspector Malivette was the pick-up man. Tr. I 172. For Wholesaler Paul Steinburg, inspector Eddie Esposito took the cash payments. Tr. I 172. Cashin elaborated that by getting the product to move faster, he a "higher turnaround [rate] of the product in the . . . wholesaler['s] store. Tr. I 171. The corrupt inspectors would settle their accounts with each other by meeting at Post and Taback's offices. They also made sure, for conformity, that their reports were consistent with one another. Tr. I 173. Cashin conceded that his activity with the other corrupt inspectors "became more like a business . . ." Tr. I 174. Cashin's understanding was that this would make it possible for the wholesaler "to get a better allowance in order to make the various loads of produce sell faster and better." Tr. I 171. Inspector Michael Tsamis, one of the arrested inspectors, who was nicknamed "the Greek," was the point man to receive Fruitco payments. Tr. I -170.

30. Later, after deciding to cooperate, the conspiracy charge was dropped. Tr. I-176.

Tr. I - 175. He was informed that, if convicted, he would face jail time.[31] Tr. I -176.

Speaking to the details of his cash payments from Mr. Spinale, he stated that Mr. Spinale would call him over and tell him that he wanted to show him something at some

31. Cashin claimed that he could not "remember" the amount of jail time he was at risk to serve, nor could he remember if the FBI agents referred to the possibility of a maximum sentence. Tr. I -177. This response was simply not credible. Never having been convicted before, Cashin certainly would have remembered critical details such as the possible length of any prison sentence. He also claimed, again with no credibility, that he could not remember if the FBI talked about that he could receive the maximum sentence because he had been taking money for so many years. Tr. I -177. Yet he remembered less critical information such as the name of the special agent for the USDA Office of Inspector General (because the FBI asked that those names not be identified, the parties agreed to refer to this individual as "Mr. G.") and the specific name of another special agent who participated in his arrest. Tr. I -178. Cashin himself later demonstrated his initial response was not credible, as he then recalled that twenty years was the maximum sentence. *Id.* Further, when shown the transcript of his deposition, which occurred not long before this proceeding, Cashin then stated his recollection had been refreshed and that he was informed at the time of his arrest that would likely face the maximum sentence. Tr. I -185, 186. Thus Cashin did remember being deposed on September 23, 2004 in the case of, *Anthony Spinale, G & T Packaging v. USA et. al.*, Docket Number 03CD 1704. Tr. I -178. At that deposition he was represented by an Assistant U.S. Attorney. The Court agrees with the Respondents' observation that Cashin, scared at the prospect of a lengthy time in prison, was anxious to save himself from that fate and would have done anything to please his captors. To suggest that Cashin had his principles and would not fabricate assertions does not deserve the dignity of a comment.

remote part of the warehouse. At the time of handing the cash, Mr. Spinale would say to Cashin: "Here" or "Hold onto to this" or words to that effect. Tr. I-195. Cashin stated that Mr. Spinale never stated what the money was for when handing the cash to him. Tr. I-195. When asked specifically if he ever asked Mr. Spinale for money, Cashin stated: "no." The Court finds this claim, both when asserted by Cashin and upon the testimony received from other witnesses in this proceeding as a whole, to lack credibility. Tr. I 195. The Court is of the view that Cashin was not forthright in his responses when asked if he ever asked or demanded money from Mr. Spinale, before or after doing an inspection. The Court observed a hesitation before Cashin's response and it noted that he looked downward before answering these questions. Tr. II 181.

Cashin agreed that there had been occasions when he inspected potatoes at G &T and produce at Tray-Wrap where he issued a certificate reflecting that the produce was U.S. Number One[32] and that Mr. Spinale did not ask him to change that grade determination. Tr. I 197. As Cashin agreed that Mr. Spinale was an expert in the produce he dealt with, he conceded that Mr. Spinale would have known in advance of his calling for an inspection that the produce was U.S. Number One grade. Tr. I 197, 198. The Court finds that, in addition to other evidence supporting the conclusion, this

32. A U.S. number one inspection for potatoes would be a certificate reflecting that the load met the requirements for the grade. Such a certificate would meet the requirements of the contract between the shipper and the consignee. In such a circumstance the wholesaler or consignee would not be eligible to receive any allowance because the produce met the grade. Tr. I 196, 197.

evidence supports Respondents' contention that Mr. Spinale called for inspections in order to get a prompt and accurate inspection.

When directed to Complainant's Exhibit 8, at page 4, reflecting a 302 report, Cashin agreed that the report stated that Mr. Spinale told the "SOURCE that the two loads of potatoes were not yet ready to be inspected."[33] As with all of his testimony regarding the 302s, Cashin drew a complete blank about any of the assertions related in those documents. In his words, "***I don't remember. I'd have to go totally by the 302***." Tr. I 203 (emphasis added). Referring to the same Exhibit 8, but this time to his inspection certificate, Cashin stated that the produce was inspected at the team track in Hunts Point market and that they were inspected in the car.[34] Tr. I 204.

Cashin stated that he would not go to any produce house unless he had first received a request for an inspection there. Tr. I 201, 202. The Court, based upon the testimony of other witnesses and Cashin's significant need for money to support his 'adult entertainer' friends, finds that Cashin's claim in this regard to be without credibility.

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33. Cashin stated this could mean that the load had not physically arrived at the wholesaler's location yet or that packages had not yet been unloaded so that they could be inspected. Tr. I 200.

34. Accordingly, as to this particular inspection, which referenced in the 302 that the produce was not ready to be inspected, Cashin agreed that one of the reasons he advanced — that the goods were not present — did not obtain in the instance related for Complainant's Exhibit 8. Tr. I 204. Thus, Cashin assumed that the only reason the goods were not ready to be inspected was that Mr. Spinale had not taken boxes out of the car for inspection. Tr. I 205.

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Cashin, upon being referred to Complainant's Exhibit 9[35], at page 16, stated that this was a re-inspection. Tr. I 205, 206. Cashin did not know why Mr. Spinale would request a re-inspection. Tr. I 209. The first inspection, again *based solely on* Cashin *reading* the assertion in the 302 associated with his certificate, was performed by inspector Eddie Esposito. Cashin stated that Esposito was another one of the indicted inspectors. Cashin knew him to be one of those who took cash payments. Tr. I 209. Cashin stated that it was common for him to have received a copy of the earlier inspection. Tr. I 206. Even if he did not have a copy of the results of the first inspection, Cashin would learn the results of that inspection[36], including details such as the percentage of decay found and like findings. Tr. I 208. Cashin agreed that this inspection would have been accurate because the railroad[37] had inspected it and because it involved freezing. Tr. I 209, 210.

Directed back to Complainant's Exhibit 8, which involved an inspection performed on July 26, 1999, Cashin stated that it exceeded the allowable 1 % soft rot, as it had 3 %. The other problems reflected in the inspection were

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35. Exhibit 9 is of particular importance because, bearing the same date, it is also the ninth count of Mr. Spinale's indictment, which represents the only count to which he pled guilty.

35. Cashin stated that the details of the earlier inspection could come from the wholesaler, through a copy of the inspection or through his supervisor reading the results to him. Tr. I 208.

37. Although Cashin stated that the railroad could inspect any load of theirs, generally they did so only if there was a claim involved. Tr. I 210.

condition defects. Each of those defects count toward the "checksum" which reflects the total of all defects found. In this case that sum was 36%. By comparison, the allowable limit is 8%, with subcategory limits of 5% internal and 5% external. Accordingly, this inspection reflected that the produce was 28% beyond the allowable limit. Tr. I 212, 213. Each of the lots were inspected for condition only. The 1,855 lot, lot 'A', had 3 % soft rot and 29 % total defects. Thus, for the latter category it was 21% over the grade limit. The 430 carton lot (lot 'B'), had 31 % total defects (i.e. 23 % over the limit) and 3 % over the soft rot limit while the 115 carton lot (lot 'C') had 7 % soft rot, but no other condition defects. This inspection was not to assess quality defects; it only inspected condition, but Cashin conceded that he would characterize the product as "bad." Tr. 1213 - 215, 218. Assessment of grade defects, had they been requested as part of the inspection, would have made the percentage of problems larger. Tr. I 215. Cashin agreed that at least in theory the wholesaler could reject the shipment simply because it was out of grade, but he added that the particular contract with the shipper controls. He stated that the USDA standards may not be not identical to industry tolerances. Tr. I 216. For example, 'decay tolerance' can be up to double that allowed by the USDA. Tr. I 216. While Cashin did not know if railroad inspectors looked at the loads reflected in Complainant's Exhibit 8, pages 6 and 7, he agreed it was possible and that he would be concerned if his inspection was inaccurate and contradicted by a railroad inspection.

Respondents' Counsel referred Cashin to Complainant's Exhibit 2 at page 5. Cashin, asked how much out of grade the inspection of tomatoes was, as reflected in that exhibit,

stated that as the U.S. standard is 5% and this inspection reflected 21% were soft and decayed, the product was 16% out of grade. Tr. II 6. No grade defects were taken for that inspection, as the inspection was for "condition"[38] only. Tr. II 7. Referring to Complainant's Exhibit 3, Cashin stated that the report reflected that under the USDA standard, the tomatoes were 10 % out of grade, which is double the allowed amount of 5%. This inspection, like the one reflected in Complainant's Exhibit 2, was for condition only. As with CX 2, Cashin agreed that if there had been grade defects with the tomatoes, that would have made the inspection report worse. Tr. II 8. Looking at Complainant's Exhibit 4, Cashin noted that the inspection reflected 24% total defects, whereas the allowable amount of defects was either 12 or 14 %.[39] II -8. Thus, the tomatoes were clearly out of grade. *Id.* The same response was elicited for Complainant's Exhibit 5, as Cashin noted that the inspection reflected 20% total defects for the tomatoes, which included 14% decay. The 14% decay meant that the product was 6 to 8% out of grade. Tr. II 9, 10. This inspection too listed only condition defects, not grade defects. Again, Cashin acknowledged that if there had been grade defects, such presence would have made the inspection worse. Tr. II 10.

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38. The Transcript actually reads "*commission only*" but the inspector obviously stated "*condition only*," as reflected in his testimony regarding Exhibit 3, which appears on the same page and connects the type of inspection reflected in Exhibit 2 with the inspection done in Exhibit 3.

39. Cashin could not recall the exact percentage of allowable defects.

Appendix B

When Cashin was directed to Complainant's Exhibit 6, at page 5, he noted that it *was* a grade *and* condition inspection. It reflected a total of 45% defects, meaning that it was either 33 or 35 percent out of grade. Obviously this meant, as Cashin conceded, this inspection reflected very significant problems for that lot. Tr. II 11.

Respondents' Counsel showed Cashin Respondents' Exhibit 7 M, containing pages A through W, and pertaining to inspection certificate number K 7673650, which he identified as a copy of a USDA potato inspection that he performed on June 23, 1999 at Chain Trucking.[40] The potatoes were in a railcar. Tr. II 15. Cashin found the load had 13% soft rot and a total of 24 percent defects. As the USDA allows only 1% soft rot, this load was out of grade by 12%. Tr. II 15. This inspection was performed on the same day as the inspection Cashin performed for Tray-Wrap as identified in Complainant's Exhibit 6 at page 5. Tr. II 14.

Turning to Respondents' Exhibit 8 C, identified as showing inspection certificate number K 767366-8, Cashin stated it reflected a potato inspection he performed on June 23, 1999. The inspection certificate lists that it was originally unloaded for SPFE468012. As identified from the original copy of that inspection, it lists Chain Trucking on it. Chain Trucking is in the same office as G &T and Tray Wrap. When

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40. Cashin deduced that Chain Trucking was G & T's company because those trucks were present at its location, both at Hunts Point and its earlier location, and because he thought its name was listed on the door at Row B along with G & T's and Tray-Wrap's name. Tr. II 91,92. However, Cashin could only assume that Mr. Spinale owned Chain Trucking. Tr. II 92.

Appendix B

Cashin met with Chain Trucking, he dealt with Mr. Spinale. Tr.II 18, 20. Cashin agreed this inspection was performed on the same day, and at the same location, virtually one inspection right after another, as the inspections reflected in Complainant's Exhibit 6, at page 5 and Respondents' Exhibit 7 M.. Tr. II 21, 22. This inspection, K 767366-8, consisted of two separate lots. The first lot had 18% total defects with 6% soft rot. Again, as only 1% soft rot is allowed, the lot was 5 % over the allowable limit. For total defects, USDA allows up to 8% total defects, but he found 18% total defects. Tr. II 22. The second lot had 12% total defects and 5% soft rot, meaning that the total defects exceeded the limit by 4% and the amount of allowable soft rot by 4%. Cashin concluded that both inspections reflected that these were bad lots.[41] Tr. II 23.

Cashin next identified Respondents' Exhibit 9 C as a copy of an inspection report he issued for the applicant Chain Trucking, performed on June 23, 1999 at 12:45 p.m., and bearing inspection certificate number K 767364. Tr. II 29, 30. Cashin's inspection revealed 11% soft rot, a number 10% over the allowable amount. It also reflected 26 % total defects, which is 14% over the USDA allowable amount. Tr. II 30.

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41. Although lead counsel for USDA objected to these exhibits, preferring the hearing to be limited to the particular inspections cited in the Complaint *and no other inspections*, Counsel for the Respondent asserted that they were part of the criminal indictment. Tr. II 24. Lead Counsel for USDA at first contended these inspections were not part of the criminal indictment of Mr. Spinale but quickly retracted that claim. Tr. II 23, 25. Respondents' Counsel's argument was that these inspections were a part of the 13 inspections in that indictment and have relevance by the fact that they reflected produce that was out of grade as well as by the fact they were all done on the same day and time. The Court agreed that the exhibits were relevant.

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Referring to all of these inspections listed above, Cashin agreed that all of them were more than 2 or 3 percentage points out of grade and in fact that they were a lot more out of grade than that. Tr. II 31, 32. Put another way, Cashin admitted that all the inspections reflected "bad loads."[42] Tr. II 32. Yet, despite agreeing that the inspections were significantly out of grade Cashin conceded that he previously testified that he was reluctant to issue inspections that were out of grade by more than a few percentage points, because he was afraid that to do so would make "the inspections too obvious and cause[] an appeal[43] and

42. To make it explicit, the Court finds that for each of the 9 counts, the loads inspected were far out of grade: CX1: 33% total defects; CX 2: 16% out of grade; CX 3: 10% out of grade; CX4: 24% defects; CX5: 6 to 8% out of grade; CX 6: 33 to 35% out of grade; CX 7:12% out of grade; CX 8: 21 to 28% out of grade; and CX 9: 14% out of grade. This, together with the totality of the other evidence in this record, supports the Court's conclusion, as discussed herein, that each of the inspections certificates in this Complaint reflected accurate descriptions of the state of the produce inspected.

43. Cashin noted that any financially interested party in a load of produce can request an appeal inspection, which amounts to a second look at the load. The procedures require that at least half of the original load must still be present for there to be an appeal inspection. The load must also be identifiable. For example, regarding Complainant's Exhibit 6, at page 5, the Lot ID is identified as 40-GL. In conducting an appeal inspection, in 1999, two inspectors would appear, one of whom would be a supervisor. The amount of samples examined in an appeal would be about twice that of the original inspection. An appeals sheet is created from this second inspection and the results are then sent to Washington D.C., where a decision is made based upon the appeals sheet findings. Tr.II 44, 45, 46. An appeal inspection is differentiated from a reinspection. If, for example, less than half of the load remains, then the inspection is deemed to be only a "reinspection," not an appeal inspection. Tr. II 46.

a lot of problems . . ." Tr. II 32. Based on the record testimony, the Court finds that the corrupt inspectors, in order to protect themselves and their scheme, would not alter the true condition of produce inspected beyond the few percentage points needed to cause the produce to fail to meet grade.

Cashin agreed that there were times when he would enter a railcar, or a trailer, and observe markings on the interior of the railcar or trailer wall. Tr.II 32. Such markings — made with a crayon or marking pen — recorded a number which was circled with a date underneath it. Tr. II 33. The number corresponded to a particular USDA inspection station, as each station had its own number. For example, the Newark, New Jersey number was 37. Cashin explained that anytime he performed an inspection when the load was still in the trailer, he was to place such a marking in it. In this way, a subsequent inspector could trace, by knowing the number and the date, information about the load. Consequently, an inspector could tell by this information if he was examining the same load that another inspector had examined. Tr.II 35. If he found such a marking, Cashin would call his office immediately. The office would inform him if the load had been previously inspected. With this information, Cashin would know whether there was any real need[44] to do a second inspection or if the second inspection was an appeal situation. Tr. II 36,

44. At times, upon advising the person requesting an inspection that there had been an earlier inspection, the inspector would be told that no further inspection was needed. At other times, an appeal inspection was sought. On other occasions, an applicant may want an entire new inspection, apart from any appeal issue. In such situations the entire load would be unloaded. Tr. II 36, 37. According to Cashin, all of this, including noting markings in a trailer and calling the USDA office, was part of the procedure he was to follow. *Id.*

37. Cashin admitted that the unofficial purpose of the call to the USDA office was to make sure the second inspection did not contradict the first inspection.[45] Tr. II 116, 117. While the supervisors at his office could never officially command such an outcome, Cashin understood that his superiors wanted the inspections results to be in agreement. Tr. II 117. Cashin admitted that, at times, he would issue a false inspection in order to have the two inspections be in agreement. Tr. II 118.

Upon being re-directed to Complainant's Exhibit 6, at page 5, (referring to inspection certificate K 767363-5, dated June 23, 1999), Cashin agreed again that the inspection reflected that the load was significantly out-of-grade, as he considered the product to be "very bad." Tr. II 40, 41. Cashin also admitted that in that instance he would have some, limited,[46] concern that his inspection reflect an accurate

45. While he hedged at first in this response, calling its use a "control," ultimately Cashin conceded that, unofficially, its real purpose *was* to make sure the inspections did not contradict one another. Tr.II 38, 39.

46. Cashin believed this risk of an appeal contradicting his inspection findings would be lessened because Tray-Wrap was a "re-packer." As such, it would take larger boxes of produce and re-pack them into smaller containers. The effect of this was that the inspected load would disappear quickly as it was redistributed by Tray-Wrap, in smaller containers, to stores. With the load apt to be gone quickly, the risk of contradictory findings was diminished. Thus an appeal would be meaningless if the load was gone before it could be accomplished. Tr. II 42, 43. Cashin stated he had never heard that once an inspection finds that the product is out-of-grade the consignee has to hold the load for 24 hours to enable the shipper an opportunity to make an appeal. Tr. II 43, 44. Again, the point is that Cashin had *zero* knowledge as to whether this or any of the loads in this litigation were in fact dispersed quickly.

assessment of the product because of the risk of an appeal from the shipper. Tr. II 42, 43. While he asserted that Tray-Wrap could re-pack a load and get it distributed quickly, *he had no knowledge* that the load identified in Complainant's Exhibit 6, at page 5, was a load that in fact moved quickly. Tr. II 47. The tomatoes involved in that inspection were size five by six and larger. While Cashin had observed Tray-Wrap re-pack tomatoes, he could not recall ever seeing that size tomato, five by six or larger, ever being re-packed. Tr. II 48, 49, 50.

Notably, Cashin admitted that, on occasion, he would go to G & T and Tray-Wrap and ask them if they had any produce to look at. Tr. II 51. This is another example of Cashin's complete lack of credibility. While his demeanor, his nineteen year record of admitted corruption, the testimony of other witnesses and other factors all support the Court's finding that Cashin was not worth believing, he even contradicted himself on this significant point, as the day before he had claimed under oath that would not visit a merchant unless there was an outstanding request for an inspection. See Transcript I at 201-202. He recalled occasions of visiting when the market was closed for a holiday but the USDA was open. While he presented this conduct as innocent activity because there wasn't much to do on such market holiday closings, he conceded that, as the USDA was open on those days, Mr. Spinale would have been able to call the USDA office and request an inspection had he wanted one performed.[47] Tr. II 51, 52. This admission makes it clear that

47. As noted above, Cashin was inconsistent on this issue. Later when Cashin was asked if there were other times when he visited Mr. Spinale's location and asked if there was an inspection he could (Cont'd)

Appendix B

Cashin was involved in what amounted to a hold-up of at least some wholesalers, like Mr. Spinale. With no inspection requested, and therefore no plausible assertion for the USDA to argue that Mr. Spinale was scheming to have produce evaluated to be less than its true condition, Cashin was clearly working his shakedown of wholesalers.

When asked about the amount of a product that was to be inspected, Cashin stated that the rule of thumb was to inspect 1%. Tr. II 53. In inspecting a truck load of tomatoes, which typically would contain 1600 boxes, about an hour or two would be required to complete such an inspection, depending on the number of defects found. Tr. II 54.

In the period from 1980 through 1999, and prior to the date of his arrest, Cashin would be assigned to do between four to twelve inspections per day. Tr. II 54, 55. His workday averaged ten to eleven hours. Cashin conceded there were not a sufficient number of inspectors at Hunts Point to accomplish the number of requested inspections. Tr. II 56. Consequently, inspections would lag from one to three days behind. Tr. II 56. Cashin stated that the USDA office received a "tremendous amount" of calls about these inspection delays and that the wholesalers were told the office was "overwhelmed . . . [and] couldn't get to it." Tr. II 57. This was significant concession as the products inspected, as everyone knows, are perishable. On the basis of this

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(Cont'd)

do, under oath he could only claim "not that I remember," the Court, in viewing the witness' demeanor and, apart from that, in evaluating the credibility of the response itself, determined that Cashin was not truthful in that response either. Tr. II 52.

admission from Cashin, and other witnesses, of the significant and chronic delays in inspections, the Court finds that these delays created an atmosphere which enabled the corrupt inspectors to make demands on the Hunts Point wholesalers who wanted timely inspections of their product. While Cashin asserted that *some* wholesalers, in attempting to deal with the problem of delayed inspections, would call for inspections even when a load had not yet arrived at their place of business, *he conceded that G & T and Tray-Wrap never did that.* Tr. II 58.

Cashin also acknowledged that in his years as a USDA inspector he did "cut corners" in performing his inspections. This practice of "shortcuts" was done by Cashin and, to the best of his knowledge, by all the USDA inspectors, whether the wholesaler was paying cash to the inspectors or if it was one of the "nonpaying [wholesaler] houses" that was not. Tr. II 59, 60. One way Cashin cut corners was to examine less than the required number of samples but, as he put it, "if a wholesaler was paying me" he simply didn't draw as many samples because he was being paid and the wholesaler and the inspector had agreed on the numbers. Tr. II 59. Cashin stated that as they could not "officially" tell the inspectors to cut corners, "unofficially" the supervisors at USDA encouraged the inspectors to take such shortcuts. They did this by encouraging the inspectors to work "as fast and as accurate as possible," but it was understood that they were expected to take shortcuts. Tr. II 60, 61.

While the Court accepts that Cashin's supervisors indirectly conveyed that he and other inspectors take shortcuts, the Court expressly finds that, particularly when

posed with questions that ran contrary to his perceived interests, Cashin was not a credible witness. Thus on matters of critical determinations to this case, the Court finds that Mr. Cashin was not believable. For example, when questioned whether he ever asked Mr. Spinale for a loan, although he said "no," the Court, viewing him as he responded, concluded that Cashin was not telling the truth.[48] Tr. II 62. When asked, in the very next question, whether he had ever asked Mr. Spinale for a "contribution" to "any kind of project that [Cashin] was involved with," Cashin responded, "Not directly, no." Tr. II 63. Explaining, Cashin asserted that Mr. Spinale "didn't like railroads" and "was always having some sort of problems with the railroads." Yet, Cashin who was involved with a railroad museum, got Mr. Spinale to make a "donation" for the museum. Tr. II 63. Cashin denied that he asked Mr. Spinale for a $10,000 donation, and stated that Mr. Spinale actually contributed "around a hundred dollars" for the museum. Tr. II 63. Yet, Cashin, apparently distinguishing that 'contribution,' still claimed that he never asked Mr. Spinale for money. Tr. II 94.

While continuing to deny that he ever asked Mr. Spinale for a loan, Cashin admitted that he knew that one of his fellow corrupt USDA inspectors, Eddie Esposito, had borrowed money from Mr. Spinale. Cashin stated that he did not know

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48. Later, in testifying about one of his fellow corrupt inspectors, Eddie Esposito, and Mr. Esposito's need for money, Cashin admitted that he told Esposito that borrowing money from Mr. Spinale "would be one option." Tr. II 68. Thus, Cashin was aware that Mr. Spinale was a source for loans. This is yet another example of Cashin's lack of credibility; denying that he ever asked Mr. Spinale for a loan, yet telling Esposito that Mr. Spinale was a loan source.

if the amount Mr. Esposito borrowed from Mr. Spinale was $20,000, but he was aware that Esposito had "a personal problem." Tr. II 66.[49]

Cashin was then directed to Respondents' Exhibit 40 Q, which involved a potato inspection he performed at Hunts Point on December 17, 1998 for Chain Trucking[50] and bearing Inspection Certificate number K673463-6. As reflected on the Inspection Certificate, it involved two lots of potatoes, both of which were cut-of-grade due to soft rot. Tr. II 72. Cashin agreed that the next occasion for him to conduct an inspection, following the December 17, 1998 inspection was not until over three months later, on March 25, 1999, the day after he was arrested. Tr. II 72, 73. Complainant's Ex. 1 at page 5, Inspection Certificate K-678086-0. Cashin admitted that when he made his March 25, 1999 post-arrest inspection he was wearing a "wire," that is, a hidden recording device, for the government. Tr. II 74.

Cashin agreed that he knew Mazie Faraci to be the office manager at G & T/ Tray-Wrap, which was located in Row B at Hunts Point. The main office, where Ms. Faraci worked, was more than a half-mile from G & T and Tray-Wrap's other office at the same Hunts Point market. Tr. II 75, 76. In contrast, G & T and Tray-Wrap's re-packing work took place at Row D at Hunts Point. Tr. II 78. Cashin would visit Ms.

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49. Cashin stated that he and Esposito had adjacent desks in the open office space at their former USDA offices. Tr. II 67.

50. Chain Trucking is listed as the party that asked for the inspection but it was performed at the G & T, Tray-Wrap warehouse. Tr. II 72.

Faraci from time to time when he needed information to complete his inspection certificates, such as trailer or railroad car numbers or shipper's addresses. Inspections rarely occurred at Ms. Faraci's Row B location[51] and Cashin stated that he never talked with her about the inspections. Cashin also stated that he never received any cash payments from Ms. Faraci, nor were any such payments ever discussed. Tr. II 77.

Significantly, and as noted earlier, when asked if he could "point to any specific inspection report where [he could] definitively say that [he] altered the inspection report at G & T or Tray-Wrap," Cashin replied, "No, I cannot." Tr. II 82. Cashin also conceded that there were many times when he agreed with Mr. Spinale's evaluation of the load being inspected. Tr. II 82.

Counsel for Respondents asked Cashin if it would be fair to characterize the cash payments made by Mr. Spinale to Cashin as a tip, as opposed to a payment intended to alter the inspection. However, Cashin evaded an answer by professing he did not know the difference between a tip and a bribe. Further, after Cashin stated that Mr. Spinale would be very specific about a load, telling him the condition or temperatures he wanted to be reflected in the inspection certificate, he could not provide a straight answer as to whether the information Mr. Spinale wanted in the inspection was in fact correct. Instead, while simultaneously agreeing

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51. On the rare occasions when Cashin made an inspection at Ms. Faraci's Row B location, he would work alone, conducting the inspection without a representative from G & T or Tray-Wrap being present. Tr. II 78.

that Mr. Spinale's information could have been correct, he could offer only that he could not remember whether the information was in fact correct. Tr. II 83, 84. The Court, dissatisfied with this apparent lapse in Cashin's ability to recall such fundamental information, inquired further:

> The Court: So, Mr. Cashin, are you stating that there were no instances in your dealings with Mr. Spinale when in fact you concluded that he was correct, or you just have no recollection at all?
>
> Mr. Cashin: There were times he was correct, and there were times where he was very specific in the numbers — for example, he would come up to me — this is just an example — and say, see this car of potatoes out here? He would say it had — you know, put down five to six percent soft-rot. The car was late. You know, it would go through and maybe the car wasn't late. He would just say just put down five, six or seven percent soft-rot.

Tr. II 84.

When asked if ever had the opportunity to look behind Mr. Spinale's assertion of the produce condition, Cashin stated that he would get "an idea of what the potatoes looked like" by going through a few samples. In those instances he maintained that "the potatoes did not indeed have five or six percent soft-rot, that they had other little problems, but not

soft-rot." Tr. II 85. However, in the face of that assertion, Cashin was unable to point to *any* specific inspection where this occurred.[52] Tr. II 85. Further, Cashin acknowledged again that Mr. Spinale is an expert on the subject of the condition of tomatoes and potatoes and that his evaluation of the product was correct.[53] Tr. II 87.

In response to a question from Respondents' Counsel, inquiring about Complainant's Exhibit 5, at page 6, (Inspection Certificate 767032), Cashin conceded that grade defects, had they been included in the inspection report, would have made the inspection results worse and

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52. In fact, when Cashin attempted to rehabilitate himself on this point, he first claimed that with regard to the inspections named in the Complaint, while he could not point to a single potato inspection where Mr. Spinale directed him to write down information that was contrary to his own observations, he claimed that such an event occurred with the tomato inspection reflected in Complainant's Exhibit 5, at pages 5 and 6. *However, he immediately conceded that this assertion rested solely upon his reading the accompanying 302 statement included within Exhibit 5 and was not based on any independent recollection of the events.* Tr. II 86. This Court has already set forth the serious, evidentiary infirmities with the 302 reports associated with the Counts in the Complaint. Fatally, Cashin could not independently recall *any* of the critical information associated with the Counts in this Complaint. *See*, as one of *many* examples, Tr. II 90. Thus, as to the specific allegations in the Complaint Cashin's testimony was completely valueless to the USDA case.

53. Nor was the *accuracy* of Mr. Spinale's assessment diminished by Cashin's contention that Mr. Spinale's numbers and scoring were not always consistent with the USDA particular dictates.

consequently would have afforded Mr. Spinale the ability to claim a larger allowance.[54] Tr. II 88.

It is noteworthy that Cashin conceded that he had no actual knowledge that either G & T or Tray-Wrap had renegotiated the price of *any* of the shipments for which he claimed, as the "designated *reader*" of the 302s, that he had altered the inspection results. Tr. II 92. Nor, for *any* of the inspections for which Cashin claimed to have altered the results, did he have anything to reflect the correct state of the shipment. Tr. II 93. Further, while one would expect that for something as momentous as the first conversation concerning this alleged bribe scheme, one would remember the details, or at least some details of such an event, Cashin maintained that he could not remember *anything* other than mentioning "helping" Mr. Spinale. Tr. II 93. This is simply not credible.

Cashin admitted that when he was arrested on March 23, 1999, he was shown video tapes of his taking bribes. Tr. II 98. In contrast, the government had no parallel evidence showing Mr. Spinale's involvement in such actions. Rather, the video involved Cashin taking money from Southeast Produce, in connection with loads of produce for the Wangs. Tr. II 98. Cashin admitted that he altered inspections for them, and in so doing, issued false inspections, receiving money in return for his actions. Tr. II 98. Further Cashin admitted that he agreed to cooperate with the United States Department

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54. Cashin asserted there would be no need to add grade defects because the load already had 14 percent decay, which reflected an excess decay of 9 percent beyond the allowable amount. Tr. II 88.

of Justice so that he would not have to go to jail.[55] Tr. II 99. Cashin well understood the terms of his bargain with the government that would enable him to avoid any jail time, despite an admitted two decade practice of getting money from produce wholesalers. To avoid jail he had to give "substantial assistance to the government," which he understood to mean giving "*the government all the help that they asked for.*" Tr. II 100 (emphasis added). Cashin agreed that he did just that.[56] Tr. II 100, 101. His goal was achieved, as he did not serve *any* jail time. Tr. II 101, 102. Further, despite the years and years of taking money, Cashin paid *no fine at all.* Tr. II 102. In significant contrast, Cashin admitted that *all* of the other eight corrupt inspectors did jail time. Tr. II 102. Instead, his sentence was only for "time served," an inaccurately employed euphemism, because the "time served" was for his testifying at "all the different hearings and trials from . . . the year 2000 . . . until . . . 2003." Tr. II 101. It is also noteworthy that, while Cashin testified, in connection with his efforts to avoid serving any jail time, to having a secret recording device on him from March 1999

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55. To reach his goal of avoiding any jail time for his decades of bribe taking, Cashin conceded that he had to get a "5k" letter from the government. To that end, he signed an agreement with the government, which agreement refers to the "5k" letter. Unlike his fellow corrupt inspectors and despite nineteen years of shaking down wholesalers, Cashin realized his goal, and did no jail time. He is employed full-time presently. Tr. II 184.

56. Cashin stated that, for each USDA hearing, he spent about four hours getting "prepped." Tr. II 105. Although he had lost track as to the number of USDA hearings in which he had testified, he thought this proceeding was his fifth such appearance. In addition, he testified in each of the criminal trials. Tr. II 106.

through August of that year, he had *the right to turn the recording device on and off as he wished.* Tr. II 108.

Cashin, asked to explain what is meant by a "consignment load," defined it as a load of produce sent from the shipper to a wholesaler, at an agreed date, with the load to be sold at the best price attainable. The wholesaler then remits a percentage of the sale back to the shipper. Tr. II 109. Respondents' Counsel questioned Cashin as to why a wholesaler ever needed to request an inspection in that circumstance since the wholesaler's remittance to the shipper is based on the amount of the sale. Cashin's understanding was that the inspection's purpose was to determine the selling price or worth of the produce to the public, *but not to obtain a better price from the shipper.* Tr. II 110. Although Cashin then stated that the inspection results would allow the wholesaler to renegotiate the price of the produce, he could not explain the logic to this, given his testimony that the consignment price is based on the amount received by the wholesaler upon the sale of the produce. Tr. II 110, 111. Thus, Cashin effectively admitted the obvious — a wholesaler has no reason to seek a fraudulent inspection in instances when the actual sale price is determinative of a load's value.

Directed to Complainant's Exhibit 1, at page 5, and pertaining to Inspection Certificate K- 678086-0, Cashin read the certification accompanying that inspection and for which his signature attested it to be an accurate inspection. That certification provided that he had in fact inspected samples of the produce and that the quality and/or condition, as shown by those samples, were as stated in his inspection. In fact, however, when asked if his signed certification accurately

reflected the quality and/or condition of the produce, Cashin confessed: "Sometimes [it] did and sometimes [it] didn't." Tr. II 113. Cashin also read into the record the "Warning" which appears to the left of the left of the inspector's signature and accompanies each inspection certificate. It provides: "Warning. Any person who knowingly shall falsify, make, issue, alter, forge or counterfeit this certificate or participate in such actions, is subject to a fine of not more than $1,000 or imprisonment for not more than one year, or both." *See, for example,* Government Ex. CX 1, at 5. Tr. II 113. Thus, Cashin, responding to whether he issued false certificates during those nineteen years, answered: "Yes, I did." Tr. II 114. Yet, for all those years of dishonesty at Hunts Point, Cashin's only price was to sing the appropriate songs for the government, or as he put it, to give "the government all the help that they asked for."

In fact, Cashin admitted that one of the variations of his decades-long false inspection certificates, involved issuing a false inspection where the amount of grade defects was *understated.* In this regard Cashin admitted that he was under instructions not to issue an inspection where the grade defects were greater than 5 %.[57] Thus, Cashin agreed that understating or diminishing the extent of the problems with a given load was also a false inspection. Tr. II 114, 116. Obviously, this class of false inspections could only operate to hurt wholesalers because the inspection would claim that the produce was in better shape than its actual condition. Cashin

57. Cashin reaffirmed in his second day of testimony, the assertion he made during his first day that he had to call the USDA office if a load had over 5 % defects and that in those instances he had to bring the evaluation of the load down to 5%. Tr. II 115.

also reaffirmed that his instructions were to continue taking samples until the initial out-of-grade findings as to quality defects ultimately reflected findings that the load was within grade.[58] Tr. II 120.

While he agreed that he had been on friendly terms with Mr. Spinale, Cashin was elusive when asked if he had ever complained to Mr. Spinale about his USDA employment, acknowledging only: "I might have. I don't remember."[59] Tr. II 126. Yet he admitted that he was growing tired of his USDA job. He contended that this stemmed from his dissatisfaction with the way in which the office was managed by Mike Wells and Mary Ann Stranch.[60] Tr. II 127.

Cashin estimated that "anywhere from sixty to seventy-five percent" of the wholesalers at Hunts Point were paying the USDA inspectors. Tr. II 128. Yet, it was his understanding that less than twenty percent of those were indicted. Tr. II 128, 129. Cashin identified the eight corrupt inspectors who were indicted as: David Ball, Paul Cutler, Edmond Esposito, Glenn Jones, Elias Malervey, Michael Strusiak, Michael

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58. While Counsel for USDA eventually got Cashin to agree that taking more samples would produce a more accurate sample, Cashin explained that for a seasoned inspector, such as himself, there is a saturation point and more samples simply will not impact the assessment of the load. Tr. II 160.

59. This is still another example of Cashin's "amnesia" when it came to matters in which his credibility was involved.

60. It is an astounding and a revealing insight into this individual that Cashin, an admitted twenty year veteran of taking money from wholesalers at Hunts Point, did not feel constrained from criticizing how others conducted themselves at USDA.

Simous, and Thomas Vincent.[61] Tr. II 135, 136. Cashin stated that this does not represent all of the inspectors who took money but only those who were indicted. Cashin maintained that Mary Ann Stranch, Mr. Luminaci, Dan Arcery, Bob Schmalick *and others* took cash. Tr. II, 136, 137. While apparently excluding himself, Cashin stated that several of the corrupt inspectors had personal problems. For example, he stated that USDA inspector Eddie Esposito had money troubles, that USDA inspector Michael Simous had a drug (cocaine) problem and a gambling problem. Inspector David Ball drank a lot and used marijuana. Tr. II 137, 138, 140.

When the subject turned to his problems, Cashin was again evasive on the subject of his financial needs. When asked if he had any "extraordinary financial needs," he could not agree to such a label, but acknowledged that he had "extra financial needs" in the form of a nightclub stripper who was, to say the least, expensive to maintain. Tr. II, 141. Cashin would see her *daily*. He informed that whenever she was *at work* (i.e. disrobing) he would "spend a lot of money." While not too expensive from his perspective, he nevertheless stated that his visits to his girlfriend's work site would cost "about $150 to $180" per visit. Tr. II 143. Shopping excursions with his "girlfriend" ran a bit more for Cashin as this would involve "a couple of thousand dollars in clothing and other *necessities*."[62] Tr. II, 144. (emphasis added). Still,

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61. The listed corrupt inspectors reflect the court reporter's phonetic effort at the spelling of these inspectors' names.

62. Cashin acknowledged that his "girlfriend" had a breast augmentation operation but he denied that he paid for the procedure,

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he insisted that while she was expensive, she was not extraordinarily so. Tr. II, 143. When asked if his girlfriend cost him over $40,000 per year, Cashin, evasive again, could only offer that he had "never added it up." Tr. II, 146. Clearly these expenses could not be shouldered solely on Cashin's official salary of $43,000, nor were his expenses limited to his girlfriend. For example, Cashin stated that he purchased a new Chevrolet Tahoe truck that, by his testimony, cost $35,000. Tr. II, 145. Nor were Cashin's extraordinary expenses limited to expensive vehicles and his "girlfriend." He also has a sister for whom he is responsible for her support, but he claimed that, prior to 1999, he had no idea what that support cost. Tr. II, 148.

While Cashin, upon redirect, reaffirmed that he received "cash bribes," it is interesting that he described this as cash Tr. II, 152. It is also of note that while Cashin recalled that some wholesalers would ask for specific inspectors and that some of them remarked that they were glad that he was the inspector sent for requested inspections, he could *not*

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asserting "[s]he had the money herself." As was Cashin's custom, he narrowly answered the question about paying for the operation. Tr. II 149. While he was asked if he paid "for an operation *or a trip* for [his] girlfriend," he only answered about the operation. The next question persisted with the issue by asking if he paid "for a trip that she had to take in order to get the operation?" In this response, while still claiming that the girlfriend had the money, Cashin equivocated in his answer by twice using the guarded phrase of "as I remember it" to qualify his answer. Tr. II 149. This is yet another example in support of the Court's conclusion that Mr. Cashin was not a credible witness.

remember associating such a remark with Mr. Spinale, stating: "I don't remember. I don't think so." Tr. II 155.

Directed to USDA Exhibit 9, CX- 9, at page 15, Cashin agreed that he remembered receiving "thank you" money, as reflected in the 302 at page 15. Cashin stated that the "substance of the conversation . . . was something along the lines of, well, here take this. I want to say thank you for all the work you did for me or something along those lines." Tr. II 156. However, Cashin could not recall the amount of money received on that occasion, only that he received "thank you" money. Tr. II, 170. However, the Court notes that, even accepting this claim as true, the statement is consistent with Mr. Spinale's position that the money was not to obtain an inaccurate inspection but rather to obtain a timely one.

Cashin reiterated that he could not recall what Mr. Spinale said to him during their initial conversation in the 1980's and that, as to the substance of that initial conversation, he could only recall the substance of what he allegedly said to Mr. Spinale. According to Cashin he told Mr. Spinale in a "business-like and friendly tone" that he was aware of the close working relationship that former inspector Bob Schmalick [ph] had with Mr. Spinale and that he would try to help "along the same lines and along the same ways." Tr. II 158. The Court observes that this retelling also can be construed as consistent with Respondents' contention. The Court noted the unusualness of Cashin's absence of recollection with regard to something as critical as the first conversation of substance with a paying customer. Tr. II 159. It simply is not credible that Cashin would not recall the details of the initiation of his payment scheme with

particular wholesalers. Yet he claimed that, regarding the start of his arrangement with Mr. Spinale, he could not remember if he approached Mr. Spinale nor whether he brought up the subject with Mr. Spinale.[63] Tr. II, 167. Cashin maintained this stance even though he acknowledged that he brought up to Mr. Spinale that he had spoken with Bob Schmalick. Tr. II 168. *Again, the Court reminds that this proceeding does not involve general assertions about Mr. Spinale's alleged actions regarding PACA inspections. Rather, as a legal proceeding, the government has, as it must, charged the Respondents with bribes given to a particular agriculture inspector arising out of PACA inspections on specific dates.* In addition to the aforementioned deficiencies, it is interesting to note that at no point in his testimony did Cashin ever relate that he directly had a conversation regarding altering a report to inaccurately reflect the condition of the goods.

Consistent with Cashin's understanding that his superiors did not want a conflict between his assessment and a previous inspection, he stated that in such circumstances another inspector would have to come out and join him in completing the inspection and that such a situation would take up "a great deal of the workday." Tr. II 161. In this regard it is worth noting that Cashin recalled such an incident involving a railroad car of potatoes at G & T, that it involved three USDA officials reviewing the conflict between the earlier inspection and the inspection at Hunts Point, and, most

63. It must also be observed that no matter how many times Cashin was asked about the circumstances in which he received payments from Mr. Spinale, the most damning thing he could claim was the completely equivocal remark to "hold onto this" when a payment was made. Tr. II 165.

importantly, that the outcome was *in G & T's favor*, overruling the earlier inspection made at the shipping point in Idaho. Tr. II 162, 180. The inspection had been requested by Mr. Spinale. Tr. II 179, 180.

As alluded to earlier, further questioning Cashin's credibility is the fact that he gave a deposition on September 23, 2004, which was a few weeks before this hearing. This again goes to the issue of his believability as he seemed to have had a memory loss only a few weeks later. In this regard the USDA attorney tried, as an attempt at rehabilitation of the witness, to have Cashin agree that the testimony he gave at the deposition was accurate as to dates and times as asked in connection with the 302's. With regard to the 302's he testified about at that time, Cashin stated that he believed his deposition testimony was accurate as to dates and times. Tr. II 163. However, the Court again notes that this vague testimony did not focus on any of the particular dates or particular 302's in the record, but rather lumped them all together.

Other aspects of Cashin's testimony unwittingly reveals the true state of his, and the other corrupt inspectors, operation. On redirect Cashin was asked again about USDA inspector Cutler's remark about the "power of the pencil."[64] Cashin elaborated that the tone of Cutler's remark clued him into the conclusion that Cutler "was *shaking people down*

64. Although Cashin claimed he either never heard or wasn't present to hear fellow corrupt inspectors brag about their ability to force merchants to give them money, he did recall the equivocal remark, made more than once by corrupt inspector Paul Cutler, about "the power in the pencil." Tr. II 133, 134.

for money, too . . ." Tr. II 164. **That Cashin used the phrase "*shaking people down*" reveals that it was the inspectors who were driving the operation, and, at least in the case of Mr. Spinale, the wholesaler was the victim.** While, in attempting to recover from this damaging statement, USDA Counsel got Cashin to agree that he never threatened to make trouble for wholesalers if they didn't pay him and that Mr. Spinale never told him he "didn't like paying [Cashin] . . . money," nor did he threaten to stop paying Cashin, all that reveals is that Cashin was smart enough to be subtle in his criminal activity and that Mr. Spinale had enough sense to realize that challenging the corrupt inspectors would cause his business to suffer. Tr.II 164.

As the Complainant's second witness, USDA witness Basil W. Coale has been the Assistant Regional Director, for the Manassas, Virginia USDA office, PACA Branch and he was the individual who conducted the disciplinary investigations of G & T and Tray-Wrap. Tr. II 193, 197. The investigations were initiated following the criminal indictment of Mr. Spinale. Tr. II 198. Coale, in his eighteen year career with USDA, has been involved with hundreds of disciplinary investigations and conducted dozens of them. Tr. II 196. Mr. Coale defined a PACA license as the license issued when a firm operating subject to the act applies for such a license and pays the appropriate fees.[65] Tr. II 198.

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65. Mr. Coale was directed to Complainant's Exhibits 10A and 10, which he identified as the agency's license record for G & T. These exhibits reflect that G & T has been licensed under the PACA since 1964, and is currently licensed, through April 3, 2005. Tr. II 205. Coale, referring to these exhibits, noted that the original license

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Appendix B

Coale stated that when he began his investigation of G & T and Tray-Wrap in the fall of 2001, he was given documents from Ms. Joan Collson, an auditor for the PACA program. Collson acted as the coordinator of the Hunts Point investigations and she provided Coale with the FBI form 302s. Coale stated that Collson received those documents from the Agriculture Inspector General *or* the compliance staff from the Agricultural and Marketing Services.[66] Tr. II 218.

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was signed for by Mr. Spinale, which reflected that he owned 50% of G & T along with George Sayer, who also owned 50%. However, during the period of the alleged violations, from July through August 1999, the records reflect that Mr. Spinale owned 100% of the stock of G & T. Tr. II 206. On the basis of Complainant's Exhibit 10A, Coale stated that, presently, Mazie Faraci is the Secretary, Treasurer and Director of G & T, Anthony Spinale is the Corporate Director, and Mary Spinale is the President and 100% stockholder. Tr. II 207, 208, 209. Mr. Coale was also directed to Complainant's Exhibit 11, which reflects the USDA license record for Tray-Wrap. Tr. II, 212, This reflects that Tray-Wrap's first license application was submitted on April 29, 1970. Tr. II, 214. Mr. Spinale was listed as the company's sole stockholder. Tr. II, 214. Complainant's Exhibit 11A reflects Tray-Wrap's current PACA license, which remains effective through May 13, 2005. Tr. II 213. However, during the period of the alleged violations, Mazie Faraci is listed as the owner of Tray-Wrap. Tr. II, 215. CX 11, at page 19.

66. Thus the record established by the government is unclear on this point. Either Coale couldn't remember which of the two Agricultural offices Collson told him they came from, or Collson herself didn't know and related to Coale that they came from one office or the other. It is up to the government to establish such facts, including the chain of custody of documents. This confusion adds yet another evidentiary problem to the many associated with the valueless 302s in this record.

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USDA Counsel directed Mr. Coale to CX 1, pages 3 and 4, which the witness identified as copies of an FBI form 302. Coale stated that form 302s are used to memorialize FBI discussions with a source. For the 302s reflected in CX 1 he noted that these 302s had redactions. Tr. II 220. Coale stated that the redactions were attributable to either special agents' names and FBI file case numbers or to information relating to matters that did not involve the Respondents in this case.[67] Tr. II 220, 221. Coale was then directed to Complainant's Exhibit 21, which he identified as a letter from the Chief Division Counsel of the FBI's New York Division, "authenticating the FBI 302s that they sent to us." Tr. II 222. Counsel for USDA did not recognize the infirmities with their attempt to connect the 302s in this record to that letter. The letter itself, CX 21, makes ***no*** identifying association with the 302s associated with this case, nor is it even addressed to any individual at USDA. In fact, the letter bears no addressee.

CX 21 is a single page and the *entire* text of the letter reads:

> **The enclosed documents are photographic copies of original FD-302s maintained by the Federal Bureau of Investigation. Redactions have been made where necessary.**

. . . .

Accordingly, there was absolutely no tie established between the nondescript cover letter, dated July 3, 2002 and the 302s in this record. Nor did any witness state that the

67. Coale stated that he knew this because he had seen the unredacted versions of these 302s. Tr. II 221.

302s in this record are the same 302s that arrived with the cover letter.[68] The Court notes that as there were many cases brought against wholesalers operating at Hunts Point, it is significant that there is no indication that this brief and completely unilluminating cover letter relates to documents regarding Mr. Spinale, G & T or Tray-Wrap.

As part of his investigation Coale visited the Respondents' place of business in October 2001 and served copies of the investigative notice and subpoenas requesting documents upon Ms. Faraci.[69] Tr. II 223, 224. Coale stated that the notice requested documents that were material to the investigation, which he described as transaction documents related to the time of the alleged violations. Tr. II 225, 226. CX 12. The documents were served upon Ms. Faraci at 8:50 a.m. on October 24, 2001. The subpoenas list some nineteen categories of documents that G & T and Tray-Wrap were to provide in a little more an hour and a half. CX 12, at page 4, and 8. When the documents were not presented by early that afternoon, Mr. Coale presented Ms. Faraci with a demand letter, which set a new deadline for the production of documents at 9:00 a.m. the following day. CX 12, at pages 3 and 7, Tr. II 229, 230. When Coale returned the next day, Ms. Faraci presented him with a letter from the

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68. A similar problem does not exist for the USDA inspection certificates, although Mr. Coale stated that he also received these from Ms. Collson. This is because the inspection certificates are self-authenticating USDA documents and because they *do* contain information identifying the subject of the inspection. Thus, as to the 302s, Ms. Collson was a critical, but missing, witness to this case.

69. Complainant introduced a drawing of a sketch Mr. Coale made of the Respondents' office layout.

Respondents' attorney[70], the essence of which stated that the records sought by the USDA no longer existed. CX 12 A, Tr. II, 231, 232. Coale agreed with Counsel for Mr. Spinale that all of the information he sought to be produced through his subpoena upon Tray Wrap and G & T was to be produced in an hour and ten minutes. Tr. III 60. CX 12. Coale also agreed that the information contained within CX 14 and 15 was subsequently obtained from G& T and Tray-Wrap about a week later and that, essentially he was provided with "any records that were less than two years old." Tr. III 61, 62. Further, Coale conceded that under the PACA rules and regulations one is only required to keep such business records for two years. Tr. III 63.

CX 14, consisting of 33 pages, are G & T corporate records provided by that Respondent and pertaining largely to the period from 1996 and 2000. Tr. II 236. They reflect that Mr. Spinale was the President of G & T, presided as the chairperson of the Board of Directors, and was the sole shareholder. Mazie Faraci appears as a co-director of G & T. Tr. II 237. When the same subject was examined for Tray-Wrap, as reflected in CX 15, Mazie Faraci's name appears as the sole shareholder, and as the President of that business. Tr.II, 239. Regarding Coale's testimony that Mr. Spinale is the director, Mary A. Spinale is the principle, and that Mazie Faraci is the secretary, treasurer and director, he agreed that this assertion was derived from USDA records and was based upon the renewal application. CX 10, at pages 2 and 3. Tr. III, 56. Based on these records, Coale agreed that in 2002 there was a change in ownership in G & T. Tr. III, 58.

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70. The letter was signed by Ms. Linda Strumpf, Esquire, who is the Respondents' trial counsel in this proceeding.

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Coale was next directed to CX 16, which is a copy of the cover page and page 469 of the Red Book Credit Services publication from March 1999. ("Red Book"). Tr. III,[71] 10/27/04, 3,4. Mr. Coale described it as a produce trade reference book. It includes financial rating information. For Tray-Wrap, Mr. Spinale is listed as the contact person. Coale was also asked by Respondents' Counsel about CX 16, and its excerpts from the Red Book Credit Services. Coale acknowledged that both the Blue Book and the Red Book are used as industry references in this regard. Tr. III, 68. Coale reiterated it as his understanding that the information in these books is self-reported, but admitted he had no direct knowledge of that claim. Tr. III, 69.

Coale was also questioned about the criminal indictment of Mr. Spinale, as reflected in CX 17. Coale stated that Mr. Spinale was indicted for bribery of a public official. Tr. III, 6. Reading from the exhibit, Coale stated that the total amount of the bribery alleged in the indictment was $1500. Tr. III, 8, 9. He was then directed to CX 18, a certified copy of the judgment in the case against Mr. Spinale. Within this exhibit, Coale noted that it reflects that Mr. Spinale pled guilty to Count 9, bribery of a public official. CX 18, page 1. Count 9 alleged that the bribery took place on August 13, 1999. Tr. III, 13. CX 18, page 1. Coale was then directed to CX 9, which duplicates the indictment pages noted above.[72] CX 9

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71. Day three of the hearing, October 27, 2004, is referred to as "Tr. III."

72. The Court did express that the unredacted version would likely show that the August 9th date was a typographical error by virtue of date references in the unredacted version. Tr. III, 19.

also includes an "FBI 302" and Coale noted that the 302 referred to August 13, 1999 and that the Inspection Certificate included within this exhibit also bears that date. Tr. III, 14. CX 9, at page 13, 14, 15. Coale also read from the indictment that Count 9 refers to $300 as the amount of bribe money and that the 302 also refers to the same amount of money. Still, Coale had no explanation for the fact that the second and third pages of this 302 listed the date *as August 9, 1999*, while the first page of this 302 lists *August 16, 1999*. Tr. III, 15, 16. Because of these inconsistencies, Counsel for USDA offered to present the unredacted version of the Form 302 in CX 9 as part of its effort to show that the 302 included with CX 9 is one document. Tr. III,18, 19. The Court noted, upon examining the unredacted version, that the only aspect which supported the USDA position that the pages were all part of the same 302 was that the paragraph numbers continue consecutively from one page of the 302 to the next.[73] Tr. III, 27. Thus, USDA counsel was unable to substantiate that these pages in fact were a unit.

Mr. Coale was also asked about CX 1, and he affirmed that he had previously seen the indictment and 302 included in that exhibit. Tr. III, 31. Mr. Coale noted that the indictment referred to an alleged $100 bribe on March 24, 1999 and that the inspection certificate included within this exhibit bears the same date. He also noted that the 302 references the name Tray-Wrap. Tr. III, 32, 33. Mr. Coale made similar observations with regard to CX 2, where he noted that Count 2 of the indictment lists a $100 bribe amount associated with March 26, 1999 and that the inspection certificate lists the

73. Other aspects, such as continuity of names from one page of the 302 to another, were not present. Tr. III, 28.

same date. Coale also noted that the 302 lists Mr. Spinale's name as well as Tray Wrap's. Tr. III, 33, 34. Both the 302 and the inspection certificate also refer to product inspected as tomatoes. Tr. III, 34. This process continued for CX 3, 4, 5, 6, 7, and 8. For CX 3, Coale noted that the inspection certificate and the 302 both referred to April 23 and both include reference to Tray-Wrap. Mr. Spinale's name appears in this 302, although it does not appear in the inspection certificate. The 302 lists that an inspection was done at approximately 11:30 a.m. while the inspection certificate lists 11:35 a.m. and both refer to the product inspected as tomatoes. Tr. III, 35, 36, and CX 3. For CX 4, the indictment refers to May 20,1999 and $100 bribery amount, while the 302 shares that date, and refers to an inspection of tomatoes at Tray-Wrap on that date at approximately the same time, and declares that Mr. Spinale paid a $100 bribe.[74] The inspection certificate that is part of CX 4 shares the same date and approximate time. For CX 5, the indictment lists June 16, 1999 as the date on which a $100 bribe was made by Mr. Spinale, while the 302 included within this exhibit conflicts, as it relates that the bribe amount was $200. The dates in the 302 conflict as well, as June 15th and June 16th are listed dates of activity.

For CX 6, Coale noted the indictment recites a bribe payment of $ 400 on June 23, 1999 and that the 302 refers to the same date and amount and includes Mr. Spinale's name. Tr. III, 40. The inspection certificate also lists the same date and it involves a tomato inspection, which is the subject of

74. Of course the characterization of the exchange of money as a "bribe" in this or any of the problematic 302s in this record is a legal conclusion for the Court to make.

the 302 as well, and both refer to Tray-Wrap. Tr. III, 41. USDA Exhibit 7 (CX 7) lists, in indictment Count 7, the alleged date of the offense as July 15, 1999 and the bribe amount as $100. The 302 included with this exhibit also lists the July 15th date, and refers to Mr. Spinale and an inspection of potatoes at G & T's facility and the inspection certificate shares the date and time listed in the 302 as well as the product inspected. For CX 8 the indictment lists July 26, 1999 and a bribery payment of $200. The 302 included with this exhibit lists the same date, indicates that potatoes were the commodity and includes Mr. Spinale's name.

USDA Counsel, referring Mr. Coale to CX 19, which is the transcript of Mr. Spinale's appearance and guilty plea before Magistrate Ronald L. Ellis on January 26, 2001, noted that Mr. Spinale stated that he "told [Cashin] the specific amount [he] wanted him to put in the inspection report. On the other dates in the indictment [he] paid Mr. Cashin $100 per inspection to influence the outcome of the report."[75]

Asked about the 302's in the record, Coale reaffirmed that he received them from Ms. Collson, an auditor with the PACA Program, Office of the Chief, and that when he saw the 302s they were in an unredacted state. Collson was not the person who created the 302s. Tr. III 88. Coale also saw the 302s as they were prepared for the hearing with the redactions added. Tr. III 73. Coale stated that Collson told

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75. As to Mr. Spinale's relationship to G & T and Tray-Wrap, USDA Counsel points to the remark made by Mr. Spinale's legal counsel in the criminal proceeding to the effect that if Mr. Spinale had to serve jail time those companies would go out of business. Tr. III 53.

him that she acquired the 302's from the FBI. Although Coale also believed that the FBI authenticated the 302's by virtue of the letter which is CX 21, that letter hardly achieves that objective. As discussed, CX 21 is merely a cover letter from the FBI bearing a date of July 3, 2002 and referring to enclosed copies of FD-302s; there is *no* indication *at all* as to case involved, nor the number of 302's enclosed. To be direct, CX 21 is a useless exhibit, with absolutely no probative value in this case. Coale conceded that he had no knowledge of what individual(s) produced the 302's and that none of them bore any signatures. Tr. III, 77. Coale also conceded that he has never met the person who signed the cover letter comprising CX 21. The most Coale could offer about the USDA's receipt of the 302's was that he *thought* they had been received by a Mr. Stanton, a USDA attorney with the Office of the General Counsel. Tr. III, 78. Coale also conceded that the 302's do not indicate who the "source" is.[76] Coale was also flummoxed regarding CX 9, pages 13, 14, and 15,[77] in that, while he contended they were

76. The fact that Coale claimed that Cashin told him that he, Cashin, was the source referred to in the 302's hardly proves the point. First, Cashin's memory was a vacuum as to all of the 302's. Beyond that, Cashin never saw the 302's until years later, nor was Cashin present when the 302's were prepared nor were they ever presented to him in order that he might review them for accuracy. As with Cashin, Coale never saw the 302's until years after they were prepared. Tr. III, 81, 82.

77. Although Counsel for USDA offered to introduce a largely unredacted version for government exhibit CX 9, at pages 13, 4, and 15, it was agreed to return that largely unredacted version, thereby keeping the original CX 9 in the record. This was done because the

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consecutive pages from the same document, he could not explain why the dates did not match[78] for those pages. Reluctantly, Coale had to concede that he had no actual knowledge that those pages were all from the same document. Tr. III, 83. *In fact, Coale agreed that he never had any discussions with any FBI agents regarding the 302's.* Tr. III, 96. Coale also conceded that his view that the Counts in the indictment correlated with the 302's in the Complainant's Exhibits was actually only a deduction he made based on the fact that the same dates listed in the counts in the indictment also appeared in the 302's which accompanied them. Tr. III, 90. 91.

In fact, when the Court specifically asked Coale whether it was:

> fair to state that the statements [he] made about the correlation, [that] there's nothing unique about [his] personal knowledge about this case which enabled [him] to make those statements about the correlations between, for example, the 302's and the particular related inspection certificates, but rather — tell me if this is a fair characterization. What you did was what any person of reasonable

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parties, and the Court, agreed that the only difference between the versions, for the purpose of this hearing, is that the unredacted version shows an uninterrupted sequence in the paragraph numbers within those particular pages. Tr. III, 99.

78. As noted, page 13 of CX 9 lists August 16, 1999, while the next two pages of that exhibit list August 9, 1999. CX 9, 13, 14, 15.

> intelligence could do, which is, to whit, you looked at the 302's, you looked at the dates of the particular counts that were involved and then you looked at the inspection certificate and you made certain common sense observations about some commonalities there, correct?"

Mr. Coale answered succinctly, "Correct."

Tr. III, 92, 93.

Coale also agreed with the Court's further observation:

> And if we pulled someone in off the street who had reasonable intelligence and — didn't have a college degree, but was literate, [he or she] could've made the same observations that you made about those correlations, right?

Coale again acknowledged, "Yes."

Tr. III, 93. Coale agreed that those concessions applied to all of the critical government exhibits, CX 1- 9, which exhibits parallel the indictment counts. Given these acknowledgments, Coale's description of Mr. Spinale's payments as "bribe payments" was derived solely from *his* translation of the "cash payments" language in the 302's, to *his* "shortened" replacement expression of "bribe." Tr. III, 95, 96.

Accordingly, on the basis of the information related above, the Court makes the following observations and

findings concerning Mr. Coale's testimony. First, in providing "testimony" about the 302's, Mr. Coale functioned solely as a 'reader' identifying and knowing nothing more about any of these documents than an individual selected at random from the New York City telephone book. Further, Mr. Spinale pled guilty to a single count, a fact USDA counsel seemed to blur during direct examination. Coale later acknowledged that Mr. Spinale pled guilty *only* to Count 9 and that the remaining counts were all dismissed. Tr. III, 54, 55. Thus, the USDA cannot bootstrap its case by transmogrifying a plea to a single count in a criminal proceeding into the multiple counts alleged in this administrative complaint. In addition, the phrase used in the plea, that cash was paid 'to influence the outcome' is equivocal in that it does not necessitate a finding that the 'influenced outcome' was an inaccurate outcome.

Beyond those observations, as pointed out by Counsel for Mr. Spinale, Coale's direct testimony omitted that ***immediately*** after Mr. Spinale admitted in his plea to telling Cashin the specific amount he wanted listed in the inspection report, he told the Magistrate:

Your Honor, I would like to state that I never intended to defraud the shippers who had sent me the produce.

Tr. III, 55.

With the conclusion of the government's case, save the sanction testimony which it asserted was, by 'custom' in these proceedings presented at the close of the Respondents' evidence, it would not have been unreasonable for the Court

to have entertained a motion for dismissal by reason of the government's failure to present a prima facie case. As such a motion was not made, the Respondents proceeded with their evidence.

The Respondents' first witness, Ms. Mazie Faraci, stated that she is employed by G & T and Tray-Wrap as the office manager and that this entails taking care of the records. Tr. III, 108. Ms. Faraci stated that she owns Tray-Wrap and is its President, owning 100 percent of its stock. She has been with G & T for forty years and with Tray-Wrap for thirty-five years, since 1964 and 1969, respectively. Tr. III, 109. Ms. Faraci stated that she was a stockholder from the time Tray-Wrap was first formed. Her working relationship with Mr. Spinale preceded these businesses, as it began in 1964. Tr. III, 110. Her business relationship with Mr. Spinale was that she provided the financing and took care of the books, while he did the buying, selling and packing of tomatoes. Her investment was $25,000 and, at the outset, she owned all of the Tray-Wrap stock. Tr. III, 111, 112. In this respect, Ms. Faraci believed that any assertion in the original PACA license application in 1969 indicating that Mr. Spinale was the sole stockholder was at odds with the facts. Tr. III, 112.

Ms. Faraci distinguished her work location from Mr. Spinale's. She works at Hunts Point Market at Row B, address number 266, whereas Mr. Spinale works at Row D, address number 401. She estimated that the two addresses were about a mile apart. Tr. III, 114. The packing and shipping occurs at Mr. Spinale's work location. Tr. III, 113. Ms. Faraci stated that the name "Chain Trucking" does not appear on the door of her office location. Tr. III, 114. Ms. Faraci believed that

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Chain Trucking is owned by a nephew of Mr. Spinale, Vincent Mineo. Tr. III, 115. In the period from 1980 to 1999, Ms. Faraci stated that she had never been present during a USDA inspection. Tr. III, 115. Her contact during this time period with any USDA inspectors was rare, limited to a few times when an inspector dropped by for the name of a shipper or like information and she was not familiar with Cashin. Tr. III, 116. Nor did she ever have any conversations with Mr. Spinale regarding cash payments to any USDA inspectors. Tr. III, 116. Ms. Faraci also stated that she never approved cash payments by Mr. Spinale to USDA inspectors and that she first became aware of such actions when Mr. Spinale was arrested and indicted. Tr. III, 117. Ms. Faraci conceded that while she owned the business, she could not 'fire' Mr. Spinale, because she had no knowledge about the produce business. Her role was to provide the capital and maintain the records.[79] Tr. III, 122-123.

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79. Given the Court's decision in this case, Respondents' alternative argument,(assuming that the Court were to have found Mr. Spinale engaged in bribery), that the USDA cannot hold the Respondents liable in any event because they did not know of Mr. Spinale's alleged activity and would never have approved of it, is moot. However, the Court must add that it does not subscribe to Respondents' Counsel's reading of *Post & Taback* to support that contention. The Department of Agriculture's Judicial Officer rejected the argument that as Post & Taback did not have actual knowledge of Alfisi's conduct with Cashin, those actions could not be deemed to be violations by the Respondent. In reaching the conclusion that the PACA licensee need not have actual knowledge of the violations, the Judicial Officer cited *H. C. MacClaren, Inc. v. U.S.D.A.*, 342 F.3d 584, (6th Cir. 2003) and *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123, (2nd Cir. 2003) as authority for that conclusion. Thus, were the Court faced with this issue, it would have rejected Respondents' contention regarding excusing employer liability for an employee's acts.

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Mr. Anthony Spinale testifying on behalf of the Respondents, stated that, at the time of the hearing, he did not consider himself employed by anyone. In 1999, however, he acknowledged being employed by G & T and that he was its president and owned its stock. Mr. Spinale did not, in the formal sense, complete high school. Tr. III 127. His formal education ended in the 7th or 8th grade. However, when he was in the military he took a test that ranked him as having the equivalent of a high school education, although he was uncertain as to the actual effect of that test. Tr. III 187. Mr. Spinale served with U.S. military in Korea. Tr. III 188. Mr. Spinale stated he formed G & T, a business involving packing potatoes, in 1964. Tr. III 132. He believed that Tray-Wrap, which was also his idea, was started in 1969. Tr. III 135 -136. Prior to starting Tray-Wrap, Ms. Faraci was an employee of Spinale and he chose to go into the tomato business with her. Tr. III 136. Spinale stated that the employees of G &T, Tray-Wrap, and another company, Mr. Sprout's, were all actually employed by G &T and certain expenses were then passed on to Tray-Wrap and Mr. Sprout. Tr. III 137. The same arrangement exists today. Tr. III 138. For example, as to Tray Wrap, a business that receives tomatoes and repackages them in smaller packages, G & T charges Tray-Wrap an amount above its actual labor costs by charging a per-package fee. Tr. III 138- 139. Mr. Spinale agreed that he ran everything regarding G & T. He would buy the product, sell it, see that it was re-packed properly, make sure that the product was of good quality, and he would determine if it needed a USDA inspection. Tr. III 140. In buying the product, generally he would work through brokers and order the potatoes he needed for any given week. Tr. III 140. He was also involved in the selling of the product, selling it to chain stores. Tr. III 141. Tray Wrap's repackaged tomatoes are sold to chain stores. Tr.III 148.

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Mr. Spinale stated that he would order a USDA inspection if he felt the product was bad. Tr. III 151. He denied that he would order an inspection if he thought the product was U.S. Number One. Tr. III 151. His determination that a product was bad came from his years of experience and involves his personal examination of the load in question. Tr.III 151. His operation moved from 230th Street to its present D 400, Hunts Point location, around 1991. Tr. III 152. He stated that the operation changed with that move, as he could no longer package the amount of potatoes that he was selling. Tr. III 152-153. He gave work to M & M Produce, another repacker, as a result of this problem. Tr. III 153. In contrast, Spinale packages all the tomatoes at the 400 Row D Hunts Point location. Tr. III 153.

Mr. Spinale stated that during the 1980s, before moving to Hunts Point, when he was located at the 230th Street location, there was a USDA inspector at the factory every day and a RPIA (Railroad Perishable Inspection Agency) inspector present. Tr. III 156, 157. He added there was a USDA inspector at that location every day from the time he was 19 years old until 1988. Tr. III 157. There was so much to inspect, the USDA kept an inspector at that location all the time. Tr. III 158. At that time it was his practice to have all loads of produce inspected. Tr. III 157. Mr. Spinale stated that he never made any cash payments to any USDA inspectors while at the 230th Street location. Tr. III 160. The Court having observed Mr. Spinale in making that assertion and noting that no evidence to the contrary exists in this record, finds that the statement is true.

Although Cashin asserted that he spoke with Mr. Spinale in 1983, Mr. Spinale denied ever having any conversation

with Cashin in 1983. Tr. III 160. Rather, Mr. Spinale believed he first met Cashin a year or so after he had moved to Hunts Point Market. Tr. III 160. He had no recollection of seeing Cashin at the 230th Street location nor did he recall an alleged incident in 1983 when a potato inspection was overruled when two other inspectors came to the site. Tr. III 161. Given Cashin's poor memory for more recent and far more critical events, the Court does not adopt Cashin's version.

Mr. Spinale stated that once he moved to Hunts Point in 1991, there was no full time inspector present all the time, as had been the case in the earlier location. Tr. III 163. At his Hunts Point location, Spinale's rail siding can only hold two cars which was less than the capacity at the earlier location. All the vendors at Hunts Point have a rail siding. Tr. III 163. However, Spinale stated he didn't use his siding on Row D. Instead loads go to "team track" first. Tr. III 163. Team Track refers to tracks behind the market itself where the trains come in and the railroad separates the trains in order. Tr. III, 164. Mr. Spinale would determine if a load needed inspection by having a truck partially unload the potatoes at Team Track. He would then look at them as they were coming off the truck or he would have his employees bring him some samples from the load and from those samples he would determine if an inspection was needed. Tr. III 164. Normally, he was the only one who decided if an inspection was warranted. Tr. III 164-165. By contrast, Mr. Spinale viewed tomato inspections to be easier because they arrived by truck and thus he would be able to view them right away. Tr. III 165.

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Speaking to the 1990's, Mr. Spinale explained his practice regarding ordering a USDA inspection. Nearly all his requests would be made by him, using the telephone. Tr. III 168. Mr. Spinale stated that when he would call for a USDA inspection to be conducted, that office would ask for the product involved, its size, and grade and whether the inspection was for grade or condition. Tr. III 170. His usual practice was to request an inspection for both grade and condition although at times he would not bother to have the inspection evaluate the grade. Tr. III 171. In those instances, his focus was on the condition of the produce. Tr. III 171. In those "condition" inspections, Mr. Spinale's intention was to make the shipper, that is the sender of the produce, aware that there were issues of decay and softness with the produce. Tr. III 171-172. Mr. Spinale noted that a potato can change in its condition while in transit but that its grade would not change. Temperature, i.e. heat, or delay are reasons that can cause the condition to change. By contrast, a 'grade defect' will not change due to transit. Such defects refer to appearance issues, such as a potato that is bent, crooked, has large cuts or is otherwise visually unappealing. Tr. III 173-174. The same observations are true for tomatoes as their condition can change during transit. Tr. III 174. Tomatoes come in different sizes: 6-7s, 6-6s, and 5-6s for example, with the 6-7s referring to the smallest. Tr. III 178. Spinale does not repack the 5-6s unless there is decay present. Some produce is sold directly from Hunts Point. Tr. III 179. This occurs from 266 Row B. Tr. III 179. By comparison, only a small percentage of potatoes are sold right from Hunts Point. Tr. III 180. Very little, only about 1%, of the potatoes are repacked by G & T. Tr. III 180. Potatoes, like tomatoes, come in sizes: 120s, 100s, etc. down to 40s. Tr. III 180.

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When asked about 1991, when he first moved his business to Hunts Point, Mr. Spinale stated that he had "quite a lot of problems" with USDA inspections at that time. Tr. III 189 - 190, 201. He felt he could not receive a fair inspection as he found himself always disagreeing with the inspectors' evaluations. Tr. III 190. As an example, he would believe that a load of tomatoes was 60 percent number one, but the inspector would list them as 80% number one. Tr. III 191. He noted that under an "appeal inspection" he could get someone else down to look at a load when he did not agree with the inspector's evaluation. Tr. III 192. Mr. Spinale stated that when he first came to Hunts Point, he didn't have too many different inspectors come to his place of business. He felt that the people considered him "kind of difficult to work with." Tr. III 192. At any rate, in 1991 and 1992, Cashin and inspector Strusiak and possibly inspector Esposito would come to his place of business. Tr. III 193. USDA's Mike Wells would occasionally do an inspection too. Essentially at that time there were three or four regulars. Tr. III 193. Spinale considered himself to have a reputation for being difficult because he was very 'hands-on' and thus directly involved. He did not delegate much and so he would look directly at the produce in question. Tr. III 193-194. He believed he was therefore "a little bit more knowledgeable" than many would be. Inspectors knew that he was knowledgeable and that he would insist on an accurate evaluation. Tr. III 194. At that time, in 1991, Wells was the head of the department for USDA's Agricultural Marketing Service and Mary Ann Stranch was his assistant. Tr. III 195-197. When he requested an appeal inspection usually two other inspectors would arrive but Mr. Spinale stated that they always affirmed the original inspector's determination. Tr. III 195-196. As he

viewed it, Mr. Spinale believed that USDA was displeased that it had to do appeal inspections. Tr. III 196. His opinion was based on the tone of voice of the USDA people. Tr. III 197. In his view USDA didn't want to have conflicts between the receiver and the shipper. They wanted things to run smoothly and an appeal inspection threatened to make things to upset things. Tr. III 196. As a consequence of the affirmations of the original inspections, and his view that such reviews were not correct, Mr. Spinale was not pleased with the results of his appeals. Tr. III 198. In fact, as evidence of his displeasure, on occasion he would call for an informal review, which is the next step after an appeal inspection. Tr. III 199. This would involve higher-ups flying in from Washington, D.C. Still, he would not win in those cases either as they would concur with the earlier inspections' conclusions. Tr. III 199.

Mr. Spinale related that sometimes it would take two days for an inspector to arrive after a request for an inspection was made. Tr. III 201. While awaiting the inspection some of the product would be sold, in the time that elapsed between the request and the actual inspection but in general he would try to save about half of a load for the inspector to see. Tr. III 202. Mr. Spinale stated that Tray-Wrap only ordered inspections when "there was something bad." He also stated that he did complain about the delay in inspections and inaccurate inspections, to USDA's Mike Wells. In addition he called Washington Agriculture employee 'Don Parrity' [ph], about this issue. Tr. III 204, 206. Spinale related that Parrity tried to pacify him, telling him "we're having problems with the inspectors . . ." Tr. III 205.

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By way of background to the issues in this proceeding, Mr. Spinale related that he knew a "Lou Guerra" [ph], a wholesaler at Hunts Point and that in the fall of 1991 he met with Mr. Guerra on the platform at 400 Row D. They had a long acquaintance, predating their Hunts Point location, and Mr. Spinale was complaining to Mr. Guerra about the difficulty of working with the Agriculture inspectors, stating that they were unqualified and did not provide a fair or timely inspection. Tr. III 208 - 209. To this complaint, Spinale related that Mr. Guerra made a gesture, rubbing together two fingers, and by that suggesting that money was required to solve the problems. Guerra then told Spinale that he would "send somebody to see [him] and he'll mention [Guerra's] name and [that Mr. Spinale would] know what [he had] to do." Tr. III 209-211. Mr. Spinale then related that the next time he requested an inspection, Cashin showed up. Tr. III 211. When Cashin appeared, he told Spinale words to the effect that "Lou [Guerra] said that I should say hello to you." Tr. III 211, 214. After Cashin completed the inspection Spinale slipped him a $100. Tr. III 211. This was done without Mr. Spinale saying a word to Cashin nor did Cashin say anything to him. Tr. III 211- 212.

Mr. Spinale also asserted that inspectors are required to look at 1% of a load but that he knew, from examining the inspectors worksheets, that this was not done. As an illustrative example, he observed that if he had 1600 boxes, the inspector's worksheet might only list 8 to 10 inspected, not the 16 required. Tr. III 216. This conclusion on his part also was based on the short amount of time it would take for the inspection to be completed. Tr. III 217. Using his example,

Mr. Spinale believed that it would take an hour and a half to inspect 16 boxes. Tr. III 218.

Mr. Spinale stated that the inspectors who were part of what he described as a "soft extortion" scheme worked closely together. As one example, he related that on occasion Cashin would tell him that a particular inspector would come by and that "he's all right." However, when not advised about a particular inspector, Spinale would not give him money. When that occurred, the inspector would make remarks to the effect 'what are you going to do with all your money?' or 'why don't you spring for dinner?' Tr. III 226. In fact, the only inspector Spinale could recall that never took money was Ms. Stranch. Tr. III 226. Spinale added that he never gave money to Mike Wells, or to a woman inspector Hernandez, [sp] either. Tr. III 229.

Having described the system employed by these inspectors, Mr. Spinale maintained that he could not get a fair inspection from the other inspectors. Tr. III 230. In support of this contention he stated that, before he started making cash payments, he would point out to inspectors that their inspection results were "nowhere close," but all he would get for a response was the inspector responding, "Well look, that's what I found. I can't help that." Tr. III 230. Regarding the cash payments to inspectors, Mr. Spinale specifically denied that he ever asked any inspector to alter an inspection. Tr. III 230, 231. He also denied ever asking for "help on an inspection." Tr. III 231. Further, he denied ever asking a shipper for an allowance where the product actually met grade and he denied ever receiving an inspection that reflected a condition that was worse than the actual

condition of the produce.[80] Tr. III 231, 234. Both in assessing the credibility of Mr. Spinale's testimony regarding these critical issues and upon consideration of the record in this case as a whole, the Court finds that Mr. Spinale was credible as to these contentions.[81]

Again, consistent with the Court's findings noted above, the Court specifically asked Mr. Spinale questions, with Spinale looking directly at the Court and after he had been reminded that his answers were under oath. In that setting, Mr. Spinale denied ever asking a USDA inspector to alter an inspection, nor did he ever ask an inspector for "help" on an

80. Despite the required cash payments, Spinale believed that, even after he started giving them, he would at times still get an inaccurate inspection, in that the inspectors never wrote up grade defects as they were supposed to do it. Elaborating, he stated that an inspector would call his office and report that he found 9 to 10 percent grade defects, but that the office would instruct the inspector to keep inspecting the load with the end result being a report reflecting only 4 or 5 percent grade defects. The Court notes that in this respect Cashin's testimony and Mr. Spinale's are in accord.

81. Interestingly, neither G & T nor Tray-Wrap are receiving USDA inspections presently. According to Mr. Spinale the USDA wanted him to sign a statement that he will not sue the United States, nor the USDA nor the inspectors or anybody that has anything to do with the USDA. Tr. VI 159. This demand, which the USDA did not contradict, seems odd from a government department which is asserting that Mr. Spinale was a wrongdoer. Such a stance could be construed as reflective of a concern that Mr. Spinale could have a legitimate basis for contending that he was the victim of soft extortion rather than a willing participant in a bribery scheme. The Court also notes that none of these assertions by Mr. Spinale were challenged by USDA during the hearing, though it had the opportunity for rebuttal evidence.

inspection, nor did he ever have an inspector downgrade an inspection so that it would not reflect the truth. Spinale added, directly facing the Court, "[w]hen these people came to me, all I wanted them to do was look at the product, give me a fair inspection. I never watched them when they were doing it, never said boo to them one way or another. If I had a complaint I would call the office and make a complaint. I wouldn't get involved with the inspector." Tr. III 235.

The Court also asked: "And so is it your testimony that you never had an objective, that is, a goal of trying to get an inspection appear to be — appear to rate the product as worse than it really was, so that you could then go back to the shipper and get some sort of discount?" Mr. Spinale responded, convincingly: "I never did that." Tr. III 236. When asked if he was sure of this, he reiterated that he "never did that" and he added "I'm positive and I'll prove it. Tr. III 236. The Court determined, based on its credibility assessment and the evidence in this proceeding as a whole, that Mr. Spinale was truthful.

Mr. Spinale was asked by his counsel to focus upon Gov. Ex. 1, at page five, CX 1- 5, which is identical to Respondents' Exhibit 1 A, RX 1 A. Tr. III 244. The indictment lists the date for Count 1 as 3/24/99. Tr. III 242. Mr. Spinale said that Count, upon review of his records from 1999, refers to inspection certificate number K678086-0. Thus the inspection on that load pertains to Count 1 from the indictment. Tr. III 244. Unlike Cashin, Mr. Spinale was able to recall what happened in connection with that inspection: "Mr. Cashin came down to do this inspection and I hadn't seen Mr. Cashin in about three and a half months. . . . [a]nd

he . . . was doing this inspection, and I told him I only wanted 400 boxes looked at, and he went and he did the 400 boxes. And after he looked at the 400 boxes, he came back to me and he says, aren't you going to have the other ones looked at? And I says, why? I says, they look all right to me. He says no. He says they're not too good. So I went back to look at them again and I said hey, Bill, there's nothing wrong with those tomatoes. Those tomatoes are all right. And he wrote up this inspection, which incidentally was just done for condition. I didn't ask for grade, it would've been a worse inspection than this. But it was only 400 boxes. He wanted me to take an inspection on 1600 boxes."[82] Tr. III 245-246.

Mr. Spinale explained that he only wanted 400 of the 1600 be inspected because he believed that only 400 of them were bad. Tr. III 246. Further, he asked for an inspection only as to 'condition' because he believed that would be enough to obtain an allowance from the shipper. Thus he did not need the inspection to include an assessment of the grade of the tomatoes. Tr. III 246. Mr. Spinale, directed to RX 1 C,[83] was asked if he received an allowance on that shipment.

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82. Spinale's recounting of this inspection, which was unrebutted by the USDA, and accepted as credible by the Court, does present a strong "odor" that Cashin, who was then a marionette for the government, was trying to set up Mr. Spinale.

83. USDA's lead Counsel objected to R's Exhibits 1 B, 1 C, and 1 D, based on Respondents initial claim that the exhibits did not exist. USDA Counsel stated that its PACA investigator was told that the records no longer existed. USDA Counsel also related that these records had been subpoenaed and then added, "not providing records is a sanctionable offense — violation of the PACA, and also not —

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disobeying a subpoena of the USDA is also sanctionable to various extents, and it can be enforced, I believe, through the U.S. District Court if it comes to that. . . . the fact that they did exist and they exist today, — even today, shows that the Respondents have had nothing but contempt for our subpoena and for the investigation, having had impeded our investigation . . . and. . . . Respondent should not be able to use any of these documents. And also because these documents exist, **there will be further review as to other sanctionable — other possible disciplinary actions stemming from the fact that these documents do still exist.**" Tr. III 248. (emphasis added). In ruling on the objection, USDA counsel affirmed, upon inquiry by the Court, that, despite counsel's outrage concerning the admission of these documents, in fact they had received them from counsel for the Respondent as part of the Court's prehearing exchange requirement and had them since March 2004, ***some seven months prior to the hearing***. Tr. III 249 - 250. Further, despite the long period of time USDA had these documents in its possession, Counsel made no objection to the exhibits until the first day of the hearing, October 25, 2004. Tr. III 253. The Court also expressed disdain for the threat made by USDA that it may bring further actions against the Respondent in connection with this issue. Tr. III 251-252. This Court was troubled and felt that is was entirely inappropriate that lead counsel for USDA's arguments concerning an evidentiary matter was not limited to the merits of that admissibility issue by including within its argument "an implicit threat . . . that this is more trouble that the government can . . . bring on down the road." Tr. III 252. Speaking as an Officer of the Court, Counsel for the Respondent represented to the Court that in fact G & T did not have those records at the time they were subpoenaed. All of those records had been turned over to Mr. Spinale's *criminal* attorney after his arrest in 1999. Accordingly when Counsel for Respondent in this *administrative* proceeding, Ms. Strumpf, went to G & T, there were in fact no records. Tr. III 254. Respondent's counsel in this administrative proceeding personally

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However, before that response could be elicited, the remainder of the trial day was spent on the resolution of the USDA's objection to the admission of Respondent's Exhibits 1B, 1 C, and 1 D, as discussed in footnote number 83.

To accommodate the schedules of witnesses for the Respondents, Mr. Spinale's testimony was interrupted and did not resume until day five of the hearing. Upon resumption of his testimony Mr. Spinale was first asked about his initial meeting with Cashin and related that it began in the early 1990's, when his business moved to Hunts Point. Tr. V. 143.[84]

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viewed this to be the case. Tr. III 254- 255. The upshot of this was that Counsel for the Respondent did not receive the records until about June 2003. Tr. III 257. Having heard both sides on this issue, the Court found a clearly credible explanation for the delayed delivery of the documents, which delayed delivery absolutely caused no disadvantage to USDA Counsel in this administrative proceeding. Despite Respondents' Counsel's honest explanation, Lead Counsel of USDA did not withdraw his objection. This caused the Court to note again that while it had not and could not have made any decision about the case at that juncture, as the evidence was ongoing and the Court would need to resolve conflicts in testimony, it was concerned from the tenor of the USDA lead counsel's remarks, suggesting, in the Court's words "the idea that there's an implication that the hand [of government] will come down again if [the outcome of this case] doesn't turn out to the government's liking in this case, that troubles me." Tr. III 260. It is inappropriate for the government, with its virtually limitless resources, to threaten continual litigation until it prevails against the Respondents.

84. Mr. Spinale's testimony resumed on October 29, 2004. It began on October 27th but was interrupted to allow other witnesses for the Respondents to testify. Mr. Spinale's resumption of testimony is designated by "Tr. V."

Subsequently, Counsel for Respondent asked Mr. Spinale about a meeting with Cashin in December 1998. Mr. Spinale stated that Cashin came to him at that time and asked him for a loan, seeking $20,000. Mr. Spinale declined and Cashin reacted by getting "a little angry," and brought up that Mr. Spinale had loaned money to his "Italian friend." Tr. V. 144. Mr. Spinale stated that he was aware that Cashin was involved with some "ladies" (i.e. the adult entertainers) he considered it a "waste of money."

Mr. Spinale was then directed to RX 40 Q, USDA inspection certificate K 673463-6, dated December 17, 1998. Tr. V. 148. The inspection applicant was listed as Chain Trucking and Cashin was the inspector. This inspection took place at the time of Cashin's request for the loan from Mr. Spinale. Tr. V. 150. Spinale was then directed to CX 1-5, inspection certificate number K 678086-0, dated March 24, 1999, another inspection performed by Cashin for Tray-Wrap. Spinale then stated that he never saw Cashin after the December 17, 1998 inspection until the March 24, 1999 inspection. Tr. V. 151-152. Prior to the December 17th inspection, Cashin was a frequent visitor to Mr. Spinale's Hunts Point location. Tr. V. 152. In general, when Mr. Spinale would request an inspection he would see Cashin a couple of times a week, yet Cashin did not appear for any inspections during the period after December 17, 1998, until his reappearance some three months later on March 24, 1999, which was shortly after he was arrested. Tr. V. 153.

Mr. Spinale was then redirected to the exhibits which USDA Counsel had objected to, RX 1 - A through D[85] and in particular RX 1- C. As discussed in the recent footnote above, the Court found no merit to USDA's objection and found the threat by USDA, which accompanied the objection, that it can bring new actions against Mr. Spinale until it achieves the litigation outcome it desires, to be patently offensive. Picking up with the subject matter that was about to be addressed when he last testified, Mr. Spinale identified RX 1C as a bill from a tomato shipper, Six L's Packing Company, and RX 1 A as the inspection certificate (K 678086-0) relating to the same shipment as RX 1-C. Tr. V. 155. Mr. Spinale stated that Tray-Wrap received an $800 allowance on the shipment, which dealt with 400 boxes of tomatoes. The inspection revealed that the tomatoes were out of grade by 26%. Tr. V. 174. Asked why only 400 boxes were inspected, Mr. Spinale explained that there were different lots on this load but only the 400 lot had problems. For that reason, he only had the 400 lot inspected. Tr. V. 156. Referring again to RX 1A, which is a copy of inspection certificate K 678086-0, dated March 24, 1999, Mr. Spinale confirmed, and the certificate itself as well as the handwritten notation on that document support, that he requested an inspection of only 400 cartons. Tr. V. 227. For the inspection reflected on RX 1A, Mr. Spinale identified Cashin as the inspector who arrived to conduct it.[86] Mr. Spinale asked Cashin where he had been for three

85. Mr. Spinale agreed that this inspection was included in the charges in the indictment. Tr. V. 159. Thus, RX 1 A is the same document as CX 1 -5 and was the basis for Count 1 of the indictment and one of the ten incidents alleged in this PACA administrative action bearing the same date and inspection certificate number.

86. Through the testimony of Mr. Spinale it was pointed out that he had no ability to request that a particular USDA inspector conduct a (Cont'd)

months, but he received only an unmemorable response. Upon showing Cashin the 400 tomatoes, Cashin initiated whether Mr. Spinale would want the other tomatoes inspected, claiming to Mr. Spinale that the other tomatoes were "pretty poor". However, when Mr. Spinale went back to look at the other tomatoes, he told Cashin to "forget about it . . . those tomatoes are good." Tr. V. 159. Respondents' Counsel asked Mr. Spinale about any cash payment to Cashin regarding the inspection reflected in RX 1A. While Mr. Spinale stated that he gave Cashin $100 for the inspection, he added that it was never for the purpose of having Cashin change or falsify the inspection. Tr. V. 190. Mr. Spinale noted that he received an $800 allowance for that problem lot and that when allowances were sought he would work through the broker involved with the sale. Tr. V 165, 170 and RX 1C. Mr. Spinale addressing the insinuation that he would want Cashin write up the whole load as bad, stated that this inspection refutes that claim, as he asked only that 400 of the cartons be inspected. Tr.V. 228. Accordingly Mr. Spinale believes this load is indicative that he acted honestly, as he only sought the limited inspection of 400 tomatoes even though the load consisted of 1600 tomatoes. Tr. V. 175. The Court concurs that by forgoing the opportunity to inflate the degree of problems with the load, this evidence supports Mr. Spinale's position that he sought only fair, accurate and timely inspections. It is noteworthy that USDA Counsel *did not*

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requested inspection, and consequently he would not know in advance which inspector would appear for a given inspection. Tr. V. 158. This testimony, which was unrebutted, supports Respondents' claim that Mr. Spinale called for inspections when he had legitimate grounds to question the quality of a shipment of produce.

recall Cashin to rebut Mr. Spinale's recounting of these events nor, for that matter, did USDA Counsel recall Cashin for any rebuttal testimony despite keeping him available for such purposes.

Mr. Spinale also confirmed his familiarity with the invitation from the Department of Agriculture for shippers to file claims against merchants connected with Operation Forbidden Fruit.[87] Yet, he stated Six L's never filed a claim against Tray Wrap. Tr. V. 160. This is significant as many growers filed actions against wholesalers who had dealings with the corrupt USDA inspectors and such growers prevailed even where it could not be demonstrated that the particular inspections involved were inaccurate. *See: Koam Produce Inc.*, 213 F.Supp.2d 314 (S.D.N.Y. 2002) and *B.T. Produce Co. Inc.*, 2004 WL 2913252 (S.D.N.Y.).

Upon being directed to RX 2 A through 2 C, involving K 678091-0, a March 26, 1999 inspection, (CX 2-5), of a load of tomatoes received by Tray-Wrap, and also shipped by Six L's, Mr. Spinale stated that the inspection reflected 20 % soft rot with the tomatoes. Tr. V. 161-162. He noted that meant the tomatoes were 15 % over the allowable limit. Tr. V. 163, 173. Mr. Spinale then identified RX 2 B as the invoice from Six L's associated with that inspection. Tr. V. 163. Yet, Mr. Spinale did *not* take an allowance on that shipment and paid the full invoice price. Tr. V 163- 164, 167. Mr. Spinale, speaking generally, but in a way that evidences his credibility, and his honesty as a merchant,

87. The FBI investigation of the corrupt USDA inspectors and their activities with some of the merchants at Hunts Point was dubbed "Operation Forbidden Fruit."

explained that there were times when he could claim an allowance yet opted not to do so when the market was very strong for a particular product. Thus, there were occasions when, even though a particular load of tomatoes could have problems, the tomatoes could still be sold for a "considerable profit."[88] In such circumstances he would forego an inspection. Tr. V. 172- 173. Further, the check from Tray-Wrap matches up with the invoice from Six L's and shows that Tray-Wrap in fact paid the full amount of the invoice. Tr. V. 178. RX 2 C and RX 2B. As true for RX 1A, while Mr. Spinale gave Cashin $100 in connection with the inspection reflected in RX 2A, he never asked Cashin to change the inspection in any way. Tr. V. 191, 193. Accordingly, despite the government claims, this is an example, and the Court so finds, of Trap-Wrap paying the full invoice even though it could have justified an allowance.

Turning to RX 3 A through 3 G, pertaining to inspection certificate K 679811-0, (CX 3-5), Mr. Spinale confirmed that all of those exhibits relate to the same shipment. Tr.V. 183. Mr. Spinale, noting RX 3D, stated that Steven Heyer is a tomato broker, who purchases tomatoes for Tray-Wrap. This

88. "Faced with this plain evidence of Mr. Spinale's honesty, the USDA had to create, through sheer speculation, the "benefit" the Respondents would receive. According to USDA, Mr. Spinale could use his forbearance to obtain better quality produce from the shipper in the future. USDA Reply Brief at 11. Of course, this is not the type of benefit that USDA premised this proceeding upon. That benefit was a wholesaler's use of an inspection that inaccurately reflected the goods to be worse than their real condition in order to renegotiate the price downward. Without the real benefit present, the USDA was relegated to concocting other 'benefits' that the Respondents supposedly received.

particular load involved 1600 boxes of size 6-7 tomatoes, and as reflected in RX 3D, there was *no charge* for these tomatoes. Tr. V. 184. RX 3D. Mr. Spinale explained that this came about when a plan by tomato growers backfired. The growers had insisted on a set price but the market would not support it. To deal with this the growers kept their "set price," but this was a fiction as they made every third load 'free.' Tr. V. 185. RX 3F and 3G show that Tray-Wrap paid the freight for these tomatoes, but nothing for the tomatoes themselves. Tr. 186. This load is particularly instructive about what was actually going on in this case. This is because, regarding inspection certificate number K 679811-0, the question arises why would Mr. Spinale request an inspection of tomatoes that he received free of charge? The answer, which the Court finds to be credible and for which the Court closely observed Mr. Spinale's testimony, was explained by Mr. Spinale, who stated that "Cashin came in one day and . . . said [he] need[ed] something to look at." Mr. Spinale, understanding that this was another hold up by Cashin, directed him to the RX 3 load and paid him "his usual gratuity." Tr. V. 188, 194. Mr. Spinale didn't tell Cashin he had nothing for him to look at because he knew Cashin "was looking for some money." Tr. V. 188. Of course, Mr. Spinale never showed the inspection to the shipper, as he rhetorically observed , "How could I get an allowance on a free load?" Tr. V. 188. The Court also notes that the government had ample opportunity to go through the USDA records and find, for example, if it existed, that Mr. Spinale had called in for an inspection of this load prior to Mr. Cashin's appearance. The fact the government failed to introduce such obvious evidence and that it never recalled Cashin to rebut Mr.

Spinale's recounting of the events, demonstrates again the lack of substance to its charges against Mr. Spinale.[89]

Referring next to RX 4, A through G, (CX 4 - 5) pertaining to inspection certificate K 765769-5, dated May 20, 1999, relating to a load of tomatoes, Mr. Spinale confirmed that all of the exhibits within RX 4 pertained to the same shipment of tomatoes, from Mecca Farms. Tr. V. 199. Mr. Spinale noted that the inspection certificate recorded that the product was out of grade by 60%, yet he did not request an allowance from the shipper because he did not need one. Tr. V. 202. Mr. Spinale explained that Mecca Farms was one his better shippers and that in this instance, as he would not be losing money, there was no need to obtain an allowance. Accordingly, he paid full price. RX 4 B, C. Tr. V 203. When asked why an inspection was requested on the produce if he had no intention of seeking an allowance, he stated that he used the inspection as a way of demonstrating to the shipper that there were quality problems and hopefully the next delivery would bring in better tomatoes. Tr. V. 204. Through the dark prism employed by USDA and even though there was no evidence to support the assertion, it suggested that Mr. Spinale even had a nefarious motive in doing this, alleging, again without any evidence to support the claim, that Mr. Spinale was doing this for future *favors*. In making such a claim the USDA appears not to recognize the distinction between evidence and rank speculation.

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89. Of course the Court recognizes that the charges are against Tray-Wrap and G & T since they hold the PACA licenses, but any real world analysis must acknowledge that this case really is about Mr. Spinale and alleged conduct.

Mr. Spinale also stated that around the time of this May 1999 inspection he telephoned USDA's Mike Wells, who was in charge of the Hunts Point USDA office, to inform him that Cashin had been acting peculiarly in that he was shaky and nervous. Mr. Spinale's concern was that Cashin could be having "mental problems" but Wells dismissed the concern, telling Mr. Spinale that Cashin was simply a "moody guy." Tr. V. 205. Despite the apparent ease of challenging this assertion, USDA, as it did with the entirety of the Respondents' evidence, made no offer of rebuttal.

Mr. Spinale was then directed to RX 5 pertaining to the load described in inspection certificate number K 767032-6, dated June 16, 1999, (CX 5 - 6), and he identified RX 5 B as the bill from West Coast Tomato, Inc. for that load. Mr. Spinale stated that, at a minimum, the tomatoes, which had serious decay, were out of grade by 12 percent. Tr. V. 210. The broker for this load, Steven Heyer, contacted Mr. Spinale concerning the problems. According to Mr. Spinale, Mr. Heyer didn't want to take the load because of the problems but the shipper asked for Mr. Spinale to take the load anyway. Tr. V. 212. Because he had a good relationship with West Coast Tomato, Mr. Spinale accommodated the shipper. In this way the shipper would have a record to show his growers that there were problems and to justify that the return would be less than the farmers would have hoped to receive. Tr. V. 212. In this instance, Mr. Spinale paid $ 4 per box plus the freight expense and the temperature report expense. West Coast Tomato never raised an objection against Mr. Spinale in connection with this load. Tr. V. 217. At the time of this inspection, Mr. Spinale asserted that Mr. Cashin was a "nervous wreck" who was no longer capable of doing a

competent inspection. Tr. V. 218. Because of that, Spinale told him what to put in the inspection, all of which was a correct and accurate description of the load. Tr. V. 218. In addition, Mr. Spinale learned through Steve Heyer that the FBI contacted Bob Spence, the shipper of this load, and Spence, (to the FBI's likely dismay) informed them that Mr. Spinale was correct — the tomatoes *were* bad when they left Florida. Tr. V. 220. The Court notes that this is yet another example of the USDA leaving a significant assertion by the Respondents unrebutted even though USDA had several resources to contradict the claim, if they believed Mr. Spinale's claim was untrue. These resources included the ability to call Mr. Spence and/or the FBI in the rebuttal phase. For obvious reasons, the Court adopts Mr. Spinale's testimony regarding the events surrounding this load and the poor condition of the tomatoes.

Next, Mr. Spinale testified with regard to his criminal indictment and guilty plea in this matter.[90] He read from the second page of the indictment, the first line of which states: "[Count] SIX [Date] 6/23/99 [Amount of Bribe] $ 400." Mr. Spinale stated that Cashin did four inspections at his place of business on June 23, 1999.[91] He identified Inspection

90. See, for example, CX 1, or CX 17, which are but two of the many places in the Complainant's exhibits where the same pages from the indictment are repeated.

91. The USDA attempted to shutter the Court's consideration of the three other inspections performed by Cashin on the same date as CX 6, June 23, 1999. These other three inspections, as reflected in RX 7 M, RX 8 C, and RX 9 C, were part of the criminal indictment but were not included in the administrative complaint because PACA

(Cont'd)

Appendix B

Certificate K 767363-5, dated June 23, 1999, as reflected in RX 6A, CX 6 -5, as the same inspection listed in the sixth count of the indictment and pertaining to the load described in that inspection certificate. Tr. V. 230. Mr. Spinale confirmed that all of the exhibits within RX 6, that is A through F, pertained to that load and the Court finds that those exhibits show that to be the case. Tr. V. 230. That load, he noted was outside of the acceptable limits by at least 35%. Mr. Spinale stated that there was an allowance for the problems with this load of $4,800 or $3 per box. Thus, Tray-Wrap paid 70% of the original invoice price. Tr. V. 236. The end result was that, after the allowance, Tray-Wrap paid Pacific Tomato Growers $12,560 for the load.[92] Tr. V.238. Mr. Spinale acknowledged that he gave Cashin $100 for the inspection reflected in RX 6 A. Tr. V. 240. However, Mr. Spinale specifically denied that he discussed with Cashin how he wanted the inspection to read, nor did he ask him to alter the inspection, nor did he ask him to falsify his inspection, nor did he ask Cashin to write down anything that was not in fact present in the inspection. Tr. V. 242. Viewing Mr. Spinale while he responded to those questions, the Court finds that Mr. Spinale was truthful in these responses and that the exhibits in RX 6 support testimony as well.

(Cont'd)
does not have jurisdiction over trucking companies. Tr. II 26. The Court overruled USDA's objection, noting that the documents were relevant to appreciating the full context of the charges brought against the Respondents. That USDA sought to have these excluded only served to highlight the fact that each inspection was proven, on the record evidence, as accurately representing the condition of the produce. *See* testimony of Harris Cutler *infra*.

92. As discussed herein, the shipper never filed a complaint against Tray-Wrap concerning this load.

Appendix B

Mr. Spinale was then asked about RX 47 A through S as well as RX 48 A through D. Tr. V. 242, 243. Mr. Spinale then identified RX 47 as involving a complaint filed on behalf of Pacific Tomato by the Florida Fruit and Vegetable Association. Tr. V. 244. From Mr. Spinale's perspective this was all part of the encouragement by USDA for growers to file claims as a consequence of the Forbidden Fruit operation. Tr. V. 245. Yet, as Mr. Spinale observed, the Florida Fruit and Vegetable Association complaint, though written in March 2000, did not include the June 23, 1999 inspection reflected in CX 6. Tr. V. 247-248. Further, as highlighted by Mr. Spinale, the entire Florida Fruit and Vegetable Association complaint against Tray-Wrap was dismissed, as verified by RX 48 A, which is a letter written by the USDA, dated May 13, 2003.

Next, Mr. Spinale was directed to RX 7, A through W. Mr. Spinale identified RX 7A as the cover of the envelope used by Mazie Faraci for G & T and in which envelope she inserts the shipment papers related to the information on the cover. Tr. V 254- 255. The exhibits within RX 7 all relate to the same railcar, SPFE457290, and this information also appears on the cover sheet of the envelope. Tr. V. 257- 259. RX 7 A. The same records of G & T reflect that the shipper was Gold Ribbon Potato Company and that 1240 100 lb sacks of small white potatoes were involved and that they were shipped on June 2, 1999, arrived on June 22nd and were unloaded the next day. Tr. V. 259. Mr. Spinale stated that in 1999 it took railcars coming from California about eight or nine days to make their journey to New York. Obviously, this meant that these potatoes were quite late in arriving. When they did arrive Mr. Spinale called for an inspection

and this is reflected in RX 7M, which bears inspection certificate number K 767365-0, and is dated June 23, 1999. Tr. V. 260. Cashin was the inspector for this load. Tr. V. 260, RX 7 M. The inspection notes that the "applicant states originally unloaded from SPFE457290." RX 7M. Mr. Spinale stated that the inspection was for condition only, not grade. He noted that the potatoes were 20 percent out of condition, that is the potatoes failed to meet grade by at least 20 %. Tr. V. 262. Next Mr. Spinale identified RX 7 N, as Inspection Certificate number K 767704-0, which is also dated June 23, 1999, and which certificate bears both Cashin's signature and that of USDA's Marianne Stranch. The certificate notes that it is a 'corrected' certificate, and that it supercedes inspection certificate number K 767365-0. It also states that the applicant stated the potatoes were originally unloaded from SPFE457290. Mr. Spinale stated that the second certificate was issued, on the same day, because Cashin listed Chain Trucking on the first certificate, not G & T Packing as it should have been listed. Tr. V. 266. Mr. Spinale then stated that, per RX 7 T, the potatoes were invoiced for $3 a sack. Tr. V. 269. Mr. Spinale then identified RX 7 - O as a "Corrected Memo" from Ball Brokerage, indicating that there was a settlement pertaining to this load at $1 per sack, plus payment by G & T for the freight. Tr. V. 270. Mr. Spinale, upon examining the other exhibits within Respondents' RX 7, noted that there was a railroad claim filed on Gold Ribbon Potato's behalf and that the potato company was paid $2481 in connection with that claim, with the result being that it was paid in full for the potatoes. Tr.V. 271, RX 7-1.

When Mr. Spinale's testimony resumed the following day, he stated that a shipper by the name of Gonzalez began

a reparation action against Tray-Wrap, but that it later withdrew the claim. Tr. VI 78.[93] This occurred because PACA *awarded Gonzalez money* but Tray-Wrap took the matter to court where it was disclosed that Tray-Wrap *never* purchased tomatoes from them, causing the matter to be withdrawn. Tr. VI 78. Based on the evidence in this record, a detached observer, with the Gonzalez matter as an example, could conclude that the remedy for the excesses of the corrupt USDA inspectors also brought about excesses in terms of some of the reparations USDA allowed.

The direct examination of Mr. Spinale then returned to June 23, 1999 and the four Inspections Cashin performed at Respondents' place of business at that time. Tr.VI 79, RX 7, A through W. Mr. Spinale stated that the inspection reflected in RX 6 A, RX 8 C and RX 9 C were also inspections performed by Cashin on that date, June 23, 1999, and the exhibits confirm this to be the case. Tr. VI 81. At that date Mr. Spinale directed Cashin to the tomato inspection first, as he believed that was the easiest for him to perform. RX 6 A. Tr. VI 82 -83. From there Cashin went on to the potato inspections. Cashin, according to Mr. Spinale, came over to him and told him the potatoes were running at 50 to 60 percent problems. However Mr. Spinale disagreed with that assessment and told him not to write down such numbers. Cashin then asked Mr. Spinale to tell him what numbers to put down in his inspection and Mr. Spinale obliged, dictating the amounts for Cashin's inspections. Tr. VI 84. Mr. Spinale

93. For continuity, this decision continues to discuss Mr. Spinale's testimony. This testimony resumed at Tr. VI at page 76, which represented the last day of the hearing.

stated that he had concluded that Cashin was then incapable of writing a fair inspection and further that his dictated amounts were consistent with the true condition of the produce. Tr. VI 84. Counsel for USDA stipulated that RX 9 C and 9 D refer to the same inspection, both dealing with June 23, 1999 inspections. Tr. VI 94. Though repetitive, because it is important, it needs to be noted again that the USDA, though Cashin was available, did not present him for *any* rebuttal testimony. Accordingly, in addition to the Court's conclusion that Mr. Spinale testified credibly on these matters, it is also noted that there is *no* contradictory evidence in the record as to these events. Mr. Spinale described his payments to Cashin as soft extortion. He believed he had no choice but to pay Cashin or he wouldn't get a fair, fast or accurate inspection. Tr. VI 98 As the inspections involved produce, obviously it was important to have prompt inspections. The four inspections accounted for the $400 paid by Mr. Spinale, as it was $100 per inspection.

Mr. Spinale then identified RX 10 B, pertaining to inspection certificate K 768741-1, issued July 15, 1999. He then identified RX 10 H and 10 I, as inspection reports, K 662108-0 and 662107-2, done in Elba, New York on July 21, 1999, for "Markey's Produce," which is formally known as Markey's Wholesale. Mr. Spinale came into possession of these inspection reports from Harris Cutler when he inquired if Mr. Cutler had other potatoes shipped around the same date as the inspections he had ordered for G & T. Tr. VI 101-102. Next Mr. Spinale was shown RX 44 as an article that was placed in a newspaper. The article related that a USDA official suggested that shippers review their

records for downward grades[94] of produce for inspections performed by the indicted inspectors and determine if the same lots had such problems noted when shipped to locations other than Hunts Point. Tr. VI 104. Mr. Spinale saw this suggestion by USDA as a good idea for him to apply as well and that was the idea that brought about the introduction of the Markey inspection certificates. The Court observes that Mr. Spinale's recognition of the USDA suggestion — that shippers look to other shipping destinations to see if similar problems were noted for the same lots — is not the conduct of a guilty man. Rather, the Court notes that such conduct is completely consistent with the conduct of a man innocent of the claim that he acted to have produce downgraded from its true condition. These inspections, as evidenced by RX 10H and 10 I, which had nothing to do with the Respondents operations and were not conducted at Hunts Point, revealed 34 % defects in one and 44 % defects in the other. Further, they involved the same product and same shipper as the Spinale certificates.(i.e., Agri Empire's Jim Dandys) and were shipped around the same time. Tr. VI 106. Thus, this is another aspect distinguishing this case from that of *Koam.*

Next, Mr. Spinale was shown RX 11 B, involving inspection certificate K769382-3, issued 7/26/99 at G & T by Cashin and RX 12 B, involving inspection certificate K

94. This is another example demonstrating that the original thrust of the USDA action was directed towards those wholesalers who, acting with corrupt inspectors, engineered inspection certificates which falsely represented the condition. Faced with the overwhelming evidence that no such false downward evaluation occurred in any of the instances cited in this administrative complaint against Mr. Spinale, USDA has scrambled to invent other supposed 'benefits' the Respondents received.

769381-5, also issued 7/26/99 at G & T and also done by Cashin. Tr. VI 107-109. Both inspections were done at the same time, one right after the other, and both pertained to potatoes from Agri-Empire. Tr. VI 109. Mr. Spinale stated that he originally requested the inspections on a Friday but that no inspector was available until the following Monday. At that time Cashin appeared but Mr. Spinale told him the product was not available to inspect. Tr. VI 112. However, Spinale told Cashin this because he believed that Cashin was no longer capable of writing an accurate inspection. Tr. VI 113. He was hoping Cashin would go away and another inspector would arrive to do the inspection. Unfortunately, it was Cashin who appeared later and at that time he did the inspection. Tr. VI 114. Mr. Spinale stated that he probably gave Cashin $200 at that time because there were two inspections involved. Tr. VI 114. Again, Mr. Spinale specifically denied that he asked Cashin to falsify or alter the inspections. Tr. VI 114. Mr. Spinale explained that if a load arrives and is far out of grade he can refuse them to the shipper or to the railroad and in this instance he refused them to the railroad. Tr. VI 115. Once again, it is noted by the Court that Cashin was not recalled to rebut Mr. Spinale's credible testimony on these points. From an evidentiary standpoint, as the Court found Mr. Spinale to be credible, this is significant.

Mr. Spinale was then shown RX 11 B, which he stated reflected that it was inspected on July 26, 1999 in a railcar and RX 11A, which also indicated a railcar was involved and that both RX 11 A and 11 B involved the same railcar, BNFE 18703. Tr. VI 117. The loads involved with these exhibits were from Agri Empire. Tr. VI 119. Mr. Spinale

recalled that all the potatoes out of California that year were of very poor quality. The Court again notes that there is *no* evidence in this record which contradicts that assertion and that Mr. Spinale was not the only witness asserting this.

Next, Mr. Spinale was directed to RX 13 C, (CX 9 -16), and inspection certificate number K 770380-4, which involved another inspection performed by Cashin, done on August 13, 1999 and involving a load of potatoes in a railcar. Tr. VI 120. Mr. Spinale stated that RX 13 B, inspection certificate K 770182-4, related to the same railcar, as both had same railcar number. Tr. VI 126-127. The record confirms that the same railcar, number BNSF 799582, did pertain to these two inspection certificates. Thus Mr. Spinale agreed that he had the same load inspected twice, the first time on August 9, 1999 and the second time on August 13, 1999. His explanation for this was that as this was August freezing of potatoes would not be easy to accomplish and, to protect-himself and the shipper, he requested the second inspection. Tr. VI 124. As this was a 'price after sale' arrangement, he did not have to request an inspection but still felt it would be better to do so and in that way he could help out the shipper. Tr.VI 124, 125. This was so because when potatoes become frozen the fault for that occurrence lies with the railroad. Having two inspections would help verify that was what happened. *This was the single count to which Mr. Spinale pled guilty.* He explained that he pled guilty to that one because it was 'price after sale' and because no other companies were involved. Tr. VI 125. Mr. Spinale also identified RX 13 CC as involving the same railcar. Tr. VI 126, He also identified a mistake in that it listed the potatoes as 100 lb sacks but they should have been listed as 50 lb

sacks since 2400 100 lb bags could not fit in a railcar. Tr. VI 127. Mr. Spinale confirmed that the shipper did file a rail claim on this shipment. Tr. VI 128. Again, at the risk of being repetitive, but noting that this was the single count to which Mr. Spinale pled guilty, the Court observes once again that USDA Counsel elected once again *not* to call Mr. Cashin as a rebuttal witness. Tr. VI 129. The Court signed his subpoena at that time so that he could depart. *See also* Tr. VI at 141.

Mr. Spinale then was asked about RX 40 A and he confirmed that it was an inspection performed at his place of business and that inspection certificate K 234074-3 was the certificate associated with that inspection, which was performed on March 27, 1996. The inspection results indicated "U.S. Number 1" and though he admitted normally he would not seek an inspection under such circumstances, he explained that he had been having problems with the USDA inspectors from that area and he had been getting unjustified rejections on these types of potatoes from the supermarket that was receiving them, so he thought he would request an inspection on them in order to stop having them sent back without cause. Tr. VI 132.

Mr. Harris Cutler was called as witness for the Respondents. Mr. Cutler is the President of Philip G. Ball, Company ("Ball Brokerage") of Clarks Summit; Pennsylvania. Tr. IV[95] 5. His company is a brokerage for fresh fruits and vegetables. One of the primary products it deals with is potatoes. Tr. IV 6. He has been in the produce business

95. Transcript references to the fourth day of the hearing, October 28, 2004, are designated as "IV," followed by the page number.

for 32 years. It is a family business, which began in 1944. As a broker, Cutler makes contracts, working on behalf of farmers, agricultural cooperatives and packing facilities, helping those groups with the marketing of their product. Tr. IV 6-7. His commission is based on the number of packages he sells. The Produce Reporter Company, which issues the Blue Book, gives Mr. Cutler's company a very good rating. Tr. IV 8. Mr. Cutler deals with a variety of shippers across the United States. Tr. IV 8. The receivers he deals with are wholesalers, re-packers, processors, and chain stores. Tr. IV 9. Mr. Cutler, who has known Mr. Spinale since 1978, stated that Mr. Spinale's reputation in the potato business is that of an expert, a very hardworking man, with a reputation for fairness and as one who is extremely careful about what he sends his customers. Tr. IV 10. Mr. Cutler added that he knows personally of Mr. Spinale's reputation for fairness and related that he knows that Mr. Spinale has such a reputation with most of the shippers, and other brokers with whom he trades. Tr. IV 10. Mr. Cutler also stated that he believes that Mr. Spinale's rating in the Blue and Red books is also very good and that these books serve as a means for farmers to determine which merchants are reputable businessmen. Tr. IV 12. Mr. Cutler made it clear that his company does not need to do business with G & T. Thus, his testimony is not biased. Rather, he expressed that his company does business with Mr. Spinale because he has found him to be an honest and honorable person. Tr. IV 18. The Court finds that Mr. Cutler's appearance, as both a reputation witness and as one testifying as to pertinent facts in this case, in itself is a significant statement about the character of Mr. Spinale.

Mr. Cutler stated that in his 32 years of experience with G & T, no shipper ever had a problem with G & T. Tr. IV 19-20. He expressed that there were only a couple of instances where shippers raised questions about G & T, noting that Agri-Empire and D. M. Camp filed actions against Spinale once the USDA announced that anyone who lost money in connection with the dishonest Hunts Point inspectors could get their money back. Agri-Empire, seeing this notice, filed an action against Spinale and D. M. Camp did the same thing. Mr. Cutler was involved because he was the broker for these transactions. He added that D. M. Camp dropped their claim, after speaking to him about the honesty of Mr. Spinale. Tr. IV 20, 22 - 23. On the basis of his long experience with G & T, Mr. Cutler also asserted that when G & T asks for an allowance, such a claim is consistent with the condition of the produce at other locations where the same product has been sent. That is, one does not find G & T having a problem with a load of produce, while others who receive shipments from the same farm have no problems with it. Tr. IV 24.

Respondents' counsel then directed Mr. Cutler to RX 7 A through 7 W,[96] starting with RX-7 S, a shipping ticket from Ball Brokerage. This ticket is created by Ball Brokerage once a shipment is loaded and sealed for delivery by truck or

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96. Lead Counsel for USDA once again raised the same objections to these exhibits, that is RX 1 through RX 13, except of course the inspection certificates within those pages, which were USDA admitted exhibits anyway, that had been fully ruled upon the day before, as these exhibits were among those held by the criminal defense attorney and, just as with the other exhibits, the USDA had these documents *long* before the hearing as part of the prehearing exchange. Tr. IV 36.

railcar. Tr. 28. Ball Brokerage, acting as the broker sells the produce from the shipper, in this case Gold Ribbon Potato Company, to the buyer, here G & T. The ticket was for a railcar of potatoes: 1,240 one hundred pound bags, B size, FOB- GGD, California, with "GGD" standing for 'grade guaranteed to destination.' Tr. IV 28, 30. FOB, "free on board," means that the in-transit risks would be assigned to the buyer, *not the seller*, unless the ticket said 'grade guaranteed to destination,' which this ticket has, i.e. it is GGD. In short, if anything went wrong in the shipping process, the burden would be on the shipper to recover any damages. Tr. 29. The railcar's number, as identified on the shipping ticket, was SPFE 457290. Tr. IV 30, RX 7 S. The product stays in the car until it reaches its destination. i.e. the produce is not moved from one railcar or truck to another. Tr. IV 30. Mr. Cutler was then asked about RX 7 T. He explained that it is an invoice from Gold Ribbon Potato Company and it showed the same railcar number — SPFE 457290. The shipping dates, and the amount of potatoes, match between the two exhibits, 7 S and 7 T. Tr. IV 31. Next, Mr. Cutler was asked about RX 7 U, a "Notice of Complaint" involving the same shipment. Tr. IV 32. He noted that on that date, June 23, 1999, his office received information concerning problems with the load. These included temperatures in the railcar between 57 and 70 degrees, soft-rot between 2 to 17 percent, and other defects that totaled 24 percent. Tr. IV 32 RX 7 U. He explained that the words "Action taken" on the document meant that G & T received the damaged potatoes and would try to get the best sale price it could. Tr. IV 33. Along with the Notice of Complaint, Ball would have received a copy of the inspection report, and the fact of such an inspection was noted in RX 7 U. When

referred to RX 7 M, the USDA inspection certificate, he affirmed it related to the same load, and pointed out that the same load number, SPFE 457290, appears on the USDA inspection certificate. Tr. IV 33-34. The inspection certificate bears a consistent date as well, June 23, 1999. It also shows the temperatures in the railcar at between 57 and 70 degrees (Fahrenheit). Tr. IV 33-34. Mr. Cutler stated that he received that inspection certificate from Mr. Spinale. Following that, he sent the notice of complaint to Gold Ribbon. Tr. IV 34. Mr. Cutler identified the company listed on RX 7 H, "The Traffic Bureau," as his company. Tr. IV 39. The Traffic Bureau files railroad claims on shipments that are damaged in transit by the railroad. Tr. 39. Mr. Cutler noted that RX 7 M refers to 430 sacks, but stated there were actually 1240 sacks in the car. Tr. IV 39 - 40. Mr. Cutler, using the Traffic Bureau, was able to secure a satisfactory settlement from the railroad to satisfy Gold Ribbon's invoice. Tr. IV 40.

When Mr. Cutler was directed to RX 7, D, E, F, and G, he identified them as mimeographed copies of the temperature control tape that evidenced that the cooling for the railcar did not function properly. Tr. IV 41. The temperature tapes reveal that the load started out at 55 degrees, on June 2, 1999. He then noted that the temp dipped to 45 degrees by the first day. RX 7 D, Tr. IV 42. By day two, the temperature had shot up to 90 degrees. The Court finds that the exhibit, RX 7 D, confirms Cutler's statement regarding the temperature and that the same exhibit shows the same railroad car number as SPFE 457290. Mr. Cutler stated that the railroad admitted it was the railroad's problem, adding that any time potatoes are exposed to such temperature swings, from 40 to 90 degrees, all kinds of bad things would

happen to them, which were reflected on the inspection of the 430 bags, showing excess decay. Tr. IV 47 Exhibit RX 7 S, the shipping ticket from Ball Brokerage, shows the potatoes were shipped on June 2, 1999. The shipment arrived on or about June 23. Tr. IV 49. RX 7 U. Typically, a load should make its journey from California in about 12 days, so this shipment was late as well. Tr. IV 49. RX 7 0 is a 'corrected memo' that re-confirms G & T's agreement with Gold Ribbon that G & T would be paying $1 for every 100 lb sack, instead of the original price of $3 per sack. Tr. IV 50. Cutler added that, as per RX 7 0, the claim rights against the railroad would remain with Gold Ribbon. The Traffic Bureau subsequently filed that claim against the railroad. Tr. IV 50. Exhibit RX 7 I, is the railroad claim statement that the Traffic Bureau sent to Gold Ribbon, along with a check, derived from funds from the railroad, for $2481.00. That amount made Gold Ribbon whole, as the $1 per sack from G & T and the check amount of $2841.00 from the compensation received from the railroad totaled to the $3 per bag that originally it would have received, had the railroad problems not occurred. Tr. IV 50, RX 7 0. Mr. Cutler was then asked about RX 7 K, which he identified as a check from the Norfolk Southern Railway Company, in the amount of $3308. Tr. IV 51- 52. He confirmed that Gold Ribbon received the full payment. The extra amount in that check included The Traffic Bureau's fee. Tr. IV 52. Thus, the record evidence, not to mention the associated credible testimony of Mr. Spinale and Mr. Cutler, indisputably shows that the inspection reflected in RX 7 M accurately reflected the poor condition of the potatoes inspected by the USDA. Although this inspection was not part of the administrative complaint, it was part of the criminal indictment of Mr. Spinale. It is

clearly relevant, as it further demonstrates that Mr. Spinale, while he felt compelled to pay Cashin's personal tariff, never acted to influence the inspection of produce to have it reflect anything other than its true condition.

Mr. Cutler was then directed to RX 8, A through N. RX 8 G is another Ball Brokerage Shipping ticket, indicating the shipment listed therein was shipped. Ball was the broker for the shipment. Tr. IV 53 - 54. It also was a railcar, number UPFE468012. The produce, potatoes, were shipped by Ball Brokerage from D. M. Camp to M & M Farms in Goshen, NY. Mr. Cutler, referring to that exhibit stated that on June 1, 1999 D. M. Camp had a car it wanted to ship of white and red potatoes. The load consisted of 499 100 lb sacks of red potatoes at $8 per sack, 386 50 lb sacks of red potatoes at $4 per sack, and 541 sacks of white B size potatoes at $5 per sack Tr. IV 55. Cutler stated that the shipment should have a temperature range between 38 and 42 degrees. Tr. IV 57. He noted that all the exhibits in RX 8 refer to the same shipment, that the railcar number, UPFE468012, was also the same and that the shipment date, June 1, 1999, was also consistent. Tr. IV 58. Cutler identified RX 8 E as the Notice of Complaint generated by his company, which indicated that the car arrived with pulp temperatures of the potatoes between 58 to 62 degrees. Two lots were inspected, one of 215 sacks showing an average of 6 percent soft-rot and a lot of 215 sacks with an average of 5 percent soft rot. The potatoes also had enlarged, raised and discolored "lenticels" (which are potato air holes or pores), which indicated high temperatures in transit. Tr. IV 59. Cutler then noted that RX 8 C is the inspection for this load. RX 8 C, which in copying did not include the name of the consignee, reflects that it is Chain

Trucking. Tr. IV 73. That RX 8 C is the inspection for this load is also reflected in Ball's Notice of Complaint as well, which bears the same inspection certificate number as the inspection. Tr. IV 61. The notice of complaint was sent to the shipper, D.M. Camp. Cutler summarized that the car arrived with problems, as reflected in exhibit RX 8 F, the "Trouble Car Sheet," generated by Ball. As reflected by RX 8 F, Mr. Cutler said it reflected concern on his part because the railcar had stopped moving. Tr. IV 63. The upshot of this was that the railcar took 22 days to arrive at its destination. Tr. IV 65. Normally the time would be between ten to twelve days. Tr. IV 65 - 66. Exhibit RX 8 H, a Ball Brokerage Corrected Memo relating to this railcar, reflects that on August 24, 1999, there was a settlement with D.H. Camp and G & T, which provided there would be an allowance of $2 per bag on the 100 lb sacks, $1 per bag on the 50 lb bags, and $2 per bag on the whites. Tr. IV 66. It also reflects that the Traffic Bureau would file a claim for D. M. Camp. Ultimately, Cutler's company did collect $1397.29 and sent it to D. M. Camp. Tr. IV 67. The railroad's actual check was for $1863.05, the higher amount again reflecting the inclusion of the Traffic Bureau's fee. Tr. IV 68. RX 8 K. Cutler affirmed the obvious: railroads don't pay claims unless they do something wrong, such as having an undue delay in the time to transport the produce or they have temperature problems with the railcar, and the person making the claim can establish such occurrence. Tr. IV 69. Here, both of those problems obtained. It has also been Cutler's experience that the railroads conduct their own investigations before they pay a claim and he estimated that the railroads inspect 95% of the railcars that arrive in New York. Tr. IV 69. In fact, he asserted that in cases where the produce was not damaged, the

railroads have challenged such non-meritorious claims by producing their own inspection results. Tr. IV 70. Thus, as with the RX 7 exhibits, the RX 8 exhibits conclusively establish that the inspection certificate accurately reflected the poor condition of the potatoes that were inspected. By now, it should be obvious from the foregoing evidence of record that Mr. Spinale was not influencing the accuracy of any of the USDA inspections. While paying off the corrupt Cashin to perform a timely, fair and accurate inspection was not, in the perfect vision that accompanies hindsight, a display of good judgment, when viewed in the full context of the circumstances, which include Mr. Spinale's penance through his single criminal plea, those payments hardly form cause for further retribution by having the licenses of the Respondents revoked.

Mr. Cutler was then directed to RX 9 A through 9 M, relating to railcar UPFE12894. Looking at RX 9 H, which is another Ball Brokerage Shipping Ticket, Cutler affirmed that it involved carload UPFE 12894 and that it was shipped on May 29, 1999. The seller was D.M. Camp. Tr. IV 73. The load was to travel from Bakersfield, California to Goshen, New York. It consisted of 1,225 100 lb sacks of white 'B' potatoes at $5 per sack, FOB, GGD (grade guaranteed to destination). Tr. IV 74. Cutler affirmed that the shipping ticket, reflecting the same invoice number, matched with the invoice from D.M. Camp in RX 9 E. Upon examining the group of pages within RX 9, Cutler summarized that they show that temperatures were between 57 to 78 degrees and that the refrigeration unit would not operate. This caused various problems with the potatoes: decay, soft-rot, discoloration and lenticels. Tr. IV 75 - 76. These temperature

problems demonstrated that there was a railroad problem. Tr. IV 76. RX 9 C, a copy of the applicable inspection certificate, had the same copying problem, with some information being cut off. Counsel for Respondent showed to the satisfaction of USDA counsel that the more complete copy of the same document reflected Chain Trucking as the applicant. Tr. IV 77. Cutler used the information on that inspection certificate for his documents, as reflected in RX 9 I and RX 9 J, its Notice of Complaint. Tr. IV 78. Cutler derived the information concerning the defective refrigeration from RX 9 B, which is an additional inspection report relating to the same load. Tr. IV 79. Cutler then sent copies of the inspection reports and his notice of complaint to D.M. Camp. Tr. IV 79. RX 9 G is another trouble car sheet, a copy of which was sent to the railroad. Cutler informed that RX 8 F and 8 G show that one railcar was sent on the May 31st and the other on June 1st. Tr. IV 80. Eventually, for efficiency purposes, the railroad connected up the two cars in the trip. Tr. IV 82-83. RX 9 K, the "corrected memo" reflects the agreement between Camp and G & T. Tr. IV 84. Under the agreement, G & T would pay $1 (one dollar) per sack, instead of the original invoice price, but that all claim rights would go to D. M. Camp, with the Traffic Bureau filing the claim on its behalf. Tr. IV 84. The claim was successful: D.M. Camp was paid the full amount of its invoice. This is reflected on RX 9 L. Tr. IV 84-85. Thus, as with each of the foregoing inspections, the evidence demonstrates that the USDA inspections associated with this load of potatoes, RX 9 B, 9 C, and 9 D, accurately reflected the poor condition of this produce.

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Next, RX 10, A through I, were discussed with witness Cutler. As with the other exhibits discussed by Mr. Cutler, he identified the shipping ticket from Ball Brokerage, which ticket lists the railcar number. In this case the car was BNFE18602. Tr IV 86, RX 10 E. Cutler agreed that it reflects July 2, 1999 as the date the load was to be shipped to G & T. The load consisted of 2400 50 lb. sacks of size A white potatoes at $3 per sack, FOB - GGD. Cutler identified RX 10 C as the invoice for that shipment. Tr. IV 87. Exhibit RX 10 F is another Notice of Complaint, just as identified in RX 8 and RX 9, except that it relates to railcar BNFE18602. Tr. IV 88. It notes 16 percent enlarged, raised and discolored lenticels, black spots and various other problems with the load. RX 10 F. Tr. IV 89. This information was derived from exhibit RX 10 B, which is the applicable USDA inspection certificate for that load. Cutler also confirmed and the exhibits themselves show that RX 10 B is the same as Complainant's Exhibit 7, at page 5. Tr. IV 89. Both bear the same inspection certificate number: K 768741-1. Tr. IV 90. Thus, RX 10 B is the same inspection certificate as CX 7 - 5. So too, RX 10 F, the Notice of Complaint, drew upon the information contained in that inspection certificate. Tr. IV 90. Exhibit RX 10 G is Ball's corrected memo, created on September 1, 1999, and reflecting that the price was settled at $1.05 per sack, FOB. Tr. IV 88. Cutler stated that the allowance was granted in this instance because the potatoes were "terrible." Tr. IV 91. This was based on the USDA certificate but Cutler added that he also knew that Agri-Empire had a very bad crop of potatoes. Tr. IV 91. Thus, based on the credible testimony of Mr. Cutler and the Respondents' exhibits associated with RX 7, RX 8 and RX 9, as well as the credible testimony of Mr. Spinale, the Court

finds that the June 23, 1999 USDA inspections associated with each of those loads of potatoes accurately reflected the true condition of the produce.

RX 10 H and RX 10 I, reflect Cutler's office file copies of the inspection certificates. It pertains to a railcar load of potatoes shipped to Markey's Wholesale in Elba, New York. These were shipped to Markey's around the same time as the load that went to G & T. Tr. IV 91. RX 10 H. As with the load to G & T, these involved 50 lb sacks, size 'A,' shipped around the same day, and showing, among similar problems, total defects of 49 percent. Tr. IV 92. Cutler's company was the broker for this shipment. RX 10 H reflects, through a sticker that was added to the exhibit by Cutler, that the produce was shipped on July 3, 1999. By comparison, G & T's load was shipped on July 2, 1999, only a day earlier. Tr. IV 92. Cutler then spoke to RX 10 I, which also had a sticker added to it by Cutler, indicating again a shipment date of July 2, 1999. Cutler indicated this was additional evidence that this crop of potatoes from Agri-Empire had tremendous problems. Tr. IV 94. Thus, Cutler's company was the broker regarding both 10 H and 10 I. In this instance the problem was not traceable to railcar temperature problems, but, based on his long experience, Cutler's educated guess was that these problem potatoes had been left too long in the field before harvesting. Tr. IV 93. As with the others, an allowance was also granted to the receiver of the load. Tr. IV 94. Cutler testified that other loads from this same bad crop were sent to Ohio and the receiver there also received an allowance. The potatoes were so poor, Cutler stated, that the receivers paid freight and "maybe a few cents" for the sacks. This amounted to a net cost of between 25 cents to 50 cents

per 50 lb bag. Tr. IV 94. The shipper, Cutler stated, acknowledged there was a problem with these potatoes. Tr. IV 94 - 95. In fact, Cutler said the shipper begged him to get people to accept the loads at whatever Cutler could fetch for it. Tr. IV 95. Significantly, G & T paid $1.75 FOB per bag, which Cutler characterized as "a big return for these [poor] potatoes." Tr. IV 96. By contrast, Markey paid much less per bag than G & T for these potatoes. Tr. IV 96. The price paid for the Ohio delivery of these potatoes was similar to that which G & T paid. Tr. IV 97. Although the Respondents had already solidly established the accuracy of the USDA inspections involved in these instances, the Markey evidence only serves to augment that conclusion.

Next witness Cutler was directed to RX 11, A through Q. RX 11 N is another Ball brokerage shipping ticket, with the buyer G & T and the seller/shipper Agri-Empire. Tr. IV 97, 100. In this instance the produce was shipped on July 13, 1999 in railcar number BNFE18703. Tr. IV 98. RX 11 N. All of the exhibits within the RX 11 group relate to the same railcar number. Tr. IV 108. Mr. Cutler noted the unusual inclusion of 'creamer' (i.e. very small) potatoes in the load, an item G& T does not typically handle. However Agri-Empire at that time, in July 1999, was desperate to move potatoes so that some return could be realized. Cutler also noted that the terms were atypical, because the potatoes were sent at "price [at] time of arrival.' That arrangement is used when there is no market for potatoes because the market was saturated. Tr. IV 99-100. RX 11- O is another "Notice of Complaint" on the Ball letterhead. G & T had notified Ball of the many problems with this load, as reflected on that exhibit. Tr. IV 101. As with the other notices of complaint,

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Ball used the USDA inspection certificate, as reflected in RX 11 B which is also identical to CX 8- 7, in preparing its document. Tr. IV 101- 103. Cutler then sent Ball's Notice of Complaint to Agri-Empire. Tr. IV 104. However, in this instance, as reflected in RX 11 P, G &T, as the consignee, refused delivery of the railcar because of the very poor condition of the potatoes. Tr. IV 104. The problems, however, were not attributable to the railroad; rather the potatoes were simply in poor condition from the outset. Tr. IV 112. As such the load failed the terms of the contract, as the problems far exceeded the allowable percentage of problems, which is 7 to 8 percent. Tr. IV 104, 105. When a load has problems to this degree, the shipper can only hope that the consignee will be willing to try to salvage it, obtaining whatever it can for it. Tr. IV 105. On this occasion, after the consignee was unable to find anyone willing to take the load, it implored Ball to see if G & T would try to salvage it. On August 9, 1999, G & T agreed to attempt to salvage the load. Tr. IV 107. RX 11 P. Cutler then described RX 11 Q, which is Ball's "Corrected Memo," bearing a date of September 2, 1999, as reflecting the settlement reached between G & T and Agri-Empire. Agri was pleased with the new agreed price because it covered its freight cost. Tr. IV 109. Mr. Cutler confirmed that at the same time as this poor load, and in the shipping period from July 2nd through September 13th, there was a "continuous stream of poor potatoes," from Agri-Empire, which were being rejected by receivers "across the United States." Tr. IV 109, 110. Accordingly, the Court finds that the evidence of record demonstrates that the inspection reflected in CX 8 - 7, (RX 11 B), accurately reflected the true condition of the produce inspected.

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Mr. Cutler was then directed to RX 12 A through 12 U. Tr. IV 113. He agreed that RX 12 K is the Ball shipping ticket reflecting a July 13, 1999 shipment of 2400 50 lb bags of size 'A' potatoes, which were priced at a time-of-arrival basis. G & T was sent a copy of the document the next day, July 14th, as reflected on the exhibit. Tr. IV 113, RX 12 K. Cutler confirmed that all of the exhibits within this group, RX 12 A through U, related to the same railcar, BNFE 18405. Tr. IV 114, 120. RX 12 L, another Ball Shipping Ticket pertaining to this load, and bearing the date of August 9, 1999, was sent to G & T and Agri-Empire. Cutler explained that, as with the RX 11 group of documents, this was another situation where the load had been refused; Agri-Empire had no place willing to take the potatoes, and it implored Ball to find someone to help them. As in the prior instance, G & T agreed to attempt to salvage the load, but with no guarantee, even as to whether it would be able to realize enough to cover the freight charge. Tr. IV 115. The Ball "Notice of Complaint" dated August 13, 1999, reflects that the load was originally rejected in July and that there was an inspection showing problems on the order of 30 percent. Tr. IV 117. RX 12 B, the USDA inspection for this load reflecting problems totaling 36 percent, was carried out on July 26, 1999. Tr. IV 119. The inspection reflects numerous problems, including lenticels, discoloration, black spots, sunken and chalky areas. Tr. IV 117- 118. A follow-up inspection was requested by G & T because the load had deteriorated further into decay, as reflected on USDA inspection certificate K 843307-0. Tr. IV 120. RX 12 C. This occurred on August 13th. Tr. IV 119. RX 12 M is Ball's Notice of Complaint, reflecting the follow-up inspection. The end result was G & T agreed to pay the freight and 25 cents per bag, an amount which was

satisfactory to Agri-Empire. Tr. IV 121. Ball's Traffic Bureau filed a complaint about the railcar, but was unsuccessful in the claim because there was no temperature tape in the railcar. The Court asked Cutler to explain the reason for different certificate numbers in RX 12 B and RX 12 M.. Tr. IV 122-123. Cutler explained that RX 12 B refers to the initial inspection of July 26th, whereas RX 12 M, refers to the follow-up inspection of the same load, conducted on August 13th. Tr. IV 123. Thus, the Court concludes that the inspection certificate reflected in CX 8 - 6, which is identical to RX 12 B, was an accurate inspection of the produce for that load.

Last, Cutler was directed to RX 13 A through GG. Tr. IV 124. Asked about RX 13 CC, Cutler identified it as a Ball Shipping Ticket dated July 29, 1999 and sent to G & T. Tr. IV 125. It related to railcar BNSF 799582, shipped on July 26, 1999. The railcar was shipped to G & T without an order because Agri-Empire was awash in potatoes. Cutler asked G & T if they would take the load on a price-after-sale basis. Tr. IV 125-126. Thus, under such an arrangement, the price is not determined until the consignee, G & T in this case, actually sells the produce. Tr. IV 126. G & T agreed to take the car under this arrangement. Although the shipping ticket states that the car had 2400 100 lb sacks, Cutler explained that was a typographical error on the Ball ticket, as Agri-Empire only packs 50 lb sacks for this type of potato. Tr. IV 127. RX 13 DD, a Ball shipping ticket dated July 29, 1999 has a handwritten notation on the bottom of the page which reads: "No inspection taken for grade condition per Harris Cutler." Mr. Cutler, who stated that he did not write that notation but thought that it looked like Mazie Faraci's writing, explained that it meant that the railcar had very bad

grade defects. His company was advised that the railcar was not going to be inspected for grade defects. Tr. IV 128. RX 13 E[E][97] is another "Notice of Complaint" from Ball. It is based on a USDA inspection certificate, number K 770182-4, dated August 9, 1999, and indicating that there was freezing affecting this load of potatoes. RX 13 B. Tr. IV 129. The Notice of Complaint reflects the extent of the freezing problem with the load, a problem attributable to the railroad. Tr. IV 131. Cutler also explained that the notation at the bottom of RX 13 DD was simply to protect the shipper's claim for recovery from the railroad, by noting that the railcar had freezing temperatures. Tr. IV 133. RX 13 D is the invoice from Agri-Empire, which was used to establish the market value of the potatoes in question at the time they were shipped. The invoice notes only the shipment date. Tr. IV 133. That is, when the invoice was created, it was already known there had been a freezing problem, but the railroad would need some basis for establishing the value of the load. Tr. IV 134. RX 13 C, USDA inspection certificate number K 770380- 4, was also identified by Cutler who noted that it involved the same railcar. Tr. IV 135. This inspection certificate also noted the freezing problems. The certificate also referenced inspection certificate K 770182- 4 of August 9, 1999. Cutler also agreed that RX 13C[][98] is the same as

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97. The Court observes that while the transcript reads that Respondents' Counsel asked about 13 E, it is obvious that the reference was to "13 EE" because 13 E is not a Notice of Complaint, but 13 EE is such a notice.

98. Here again, the Court notes that the transcript reads Respondents' Counsel asking about whether RX 13 "CC" but (Cont'd)

CX 9 at page 16. Tr. IV 135. Mr. Cutler then identified the railroad temperature tapes in connection with this railcar. RX 13 V, W, X, Y, Z and AA.[99]

The Court notes that this inspection is one of those the government claims was falsified. In fact, it involves the very important inspection for which Mr. Spinale pled guilty to the single count of bribery. Tr. IV 139. *Lead Counsellor Agriculture agreed that the load was frozen, but did not wish to withdraw the claim that the inspection was falsified.* Tr. IV 139.

Mr. Cutler went on to identify the temperature tapes associated with the exhibits listed next above and he noted that the temperature tapes related to railcar number BNSF 799582.[100] Tr. IV 140. At the hearing, he read the tape, noting

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(Cont'd)
obviously the reference was to RX 13 "C" as that is the same document as CX 9 at page 16. Further, Respondents' Counsel's next question *does* refer to RX 13 C. Tr. IV 136. Complainant's Counsel then stipulated to the identity of those documents. Tr. IV 137.

99. As noted, the original temperature tape had to be used in order for Cutler to testify about it. Subsequently, per the Court's direction, Counsel for the Respondent made new copies of the original tape and the new copies were substituted and they now appear in the record as RX 13V through AA. Tr. IV 181.

100. While initially there seemed to be a problem with these exhibits, because the temperature tape in question had a gap, this problem was eliminated because Counsel for Respondent produced the original temperature tape, which was somewhat unwieldy because of its approximate four foot length. Tr. IV 142.

a fluctuation from 66 degrees to a low of 30 degrees over a thirteen day period. Tr. IV 147. In contrast the temperature should have ranged from between 38 to 40 degrees. Tr. IV 148. In short, the tape itself confirms the accuracy of the USDA inspection certificate information that the potatoes had been frozen. Tr. IV 148-149. As with the other exhibits discussed by Mr. Cutler, the Traffic Bureau filed a claim. RX 13 GG. Tr. IV 149. Once the railroad received the results of the second inspection relating to this car, the inspection of August 13, 1999, the railroad then agreed to pay to settle the claim. Mr. Cutler noted that the railroad itself also inspected this railcar. Tr. IV 151. Cutler's letter of December 12, 2000 also reflects that Mr. Spinale advised that the railroad should carefully review the temperature tape. The upshot of this event, was that the railroad paid $3,250 for the claim and that, when added to the $1,200 that G & T paid for the potatoes, the total constituted a fair settlement overall. Tr. IV 152-153. Thus, consistent with Mr. Spinale's statement at his plea, the evidence shows and the Court finds that the inspection certificate accurately reflected the condition of the produce. Consequently, these exhibits also demonstrate that Mr. Spinale was paying a fee to Cashin, but not to work an inaccurate inspection of the produce.

During cross-examination, Counsel for USDA had Mr. Cutler acknowledge that the in-transit risk for the potatoes in RX 7 was on the shipper, Gold Ribbon. Tr. IV 158. Gold Ribbon was paid in full, between the amount Mr. Spinale paid and the amount the railroad paid. Tr. IV 159. Regarding RX 8, Mr. Cutler stated that the shipper also was paid in full, in part by G & T with the balance paid by the railroad claim. Tr. IV 160. Counsel's point is apparently

to note that G & T did not end up paying the invoice price. In fact, this was expressly the point of Counsel for the USDA's questions — that while the shipper was paid in full eventually, it was not paid in full by G & T. Tr. IV 162. Unfortunately, when USDA asked Mr. Cutler what he would have done, if he had known that Mr. Spinale was paying bribes, he received a resounding rebuff. Mr. Cutler testified with great earnestness and credibility that in *twenty years* of knowing Mr. Spinale he knew him *not* to be "cheat or a briber or whatever you're calling him here." Tr. IV 165.

The next witness for the Respondents was Edmund R. Esposito, who was formerly an inspector for USDA at Hunts Point Market. He worked at that job, which is formally titled "agricultural commodity grader," from July 1990 until October 1999 at Hunts Point. Tr. IV 183-184, 189. Mr. Esposito was one of the inspectors arrested during October 1999 in connection with "Operation Forbidden Fruit" Tr. IV 184. He was charged with RICO violations, bribery of a public official, and racketeering. Tr. IV 184. He pled guilty to some charges in March 2000 and other inspectors pled guilty at that time as well. Tr. IV 185. The other inspectors included Dave Ball, Paul Cutler, Glenn Jones, Mike Simous [ph], and Mike Stusiak [ph]. Tr. IV 185. Esposito ended up being sentenced to 24 months in prison and two years probation. Tr IV 187. Because of 'good time' he actually served 21 months in prison. Tr. IV 186. As of the time of his testimony in this hearing he had completed his probation period. Tr. IV 186.

Esposito was trained on-the-job by none other than USDA inspector Bill Cashin. Tr. IV 190, 200. When Esposito

began working for USDA, Lou Maniacci [ph] was the night supervisor. Around January or February of 1999 Glenn Jones became the night supervisor. As noted, Jones also was one of the USDA inspectors who was arrested. Tr. IV 192. Although inspections were to be carried out in the order received, that is, according to the date and time they were requested, Esposito stated that, for efficiency purposes, it often did not work out that way in practice. Tr. IV 194. While Esposito's supervisor, Officer in Charge, ("OIC") Mike Wells, wanted the inspectors to do their inspections according to the time requested, Esposito maintained that the inspectors still did them as they wished and that the supervisors didn't push the point too much because "if they made us too mad, well, then we would slow down on inspections and get way behind." Tr. IV 195- 196. Mary Ann Stranch was the assistant to Mr. Wells during this time. Tr. IV 196. When Esposito started at Hunts Point there were about 17 to 18 USDA inspectors working at that location and about the same number worked there when his employment ended. Tr. IV 196-197.

In Mr. Esposito's opinion, there was a shortage of inspectors at Hunts Point. He based this on the fact that their inspections covered more than Hunts Point, as they included all five New York boroughs. His opinion was also based on the inspectors' delay in getting to assigned inspections. Esposito stated that "it might be two or three days before we'd even get to do an inspection for places." Tr. IV 197. Esposito stated that he was one of the most productive inspectors in that he was able to do from nine to thirteen inspections per day. Tr. IV 200. The time to conduct an inspection could vary from five minutes to an hour and a

half. Tr. IV 200. Mr. Esposito also stated that his training was minimal, as he was trained for only a week before he was sent out to do inspections on his own. Tr. IV 200. He claimed that inspectors are supposed to go to market training school but that he never received that training until some four or five years after his employment began and only then because he insisted on it. Tr. IV 200. Esposito also stated that Cashin, during the time he was training him, went to some merchants' houses more than others. Tr. IV 202. He explained that at first this was due to bigger merchants having more requests for inspections than smaller houses but later on he learned "there were the houses that were . . . a lot funner *(sic)* to go inspect for." Tr. IV 203. Mr. Esposito then related that, after some three or four weeks on the job, Cashin told him about merchants giving cash payments to inspectors for inspections. Tr. IV 203. Others told him of this arrangement too. Tr. IV 203. According to Esposito, he was told by these dishonest inspectors that "we're going to do inspections, we're going to make sure that they're out. We're going to make money. If they don't want to cooperate, then we turn around and do what we have to do to convince them to pay." Tr. IV 204.

Mr. Esposito stated that Dan Arcery [ph] and Cashin were in charge of the group of dishonest inspectors. Tr. IV 206-207. According to Esposito, some the group of dishonest inspectors were not indicted. Tr. IV 208. He asserted that something on the order of nine inspectors and thirteen wholesalers were indicted. Tr. IV 209. Esposito added that while former inspector Paul Cutler was one of the dishonest inspectors, he was not part of the "group" of dishonest inspectors, essentially because he was not well liked by the

other inspectors. Tr. IV 210-211. Mr. Esposito knew Don Paradis [ph], a USDA employee who was in charge of the inspectors' division in Washington, D.C. Tr. IV 212. Esposito had heard from other inspectors that Paradis used to work at Hunts Point and that he was also taking cash payments from wholesalers. TR. IV 212. The 'group,' as Esposito referred to the cabal of corrupt inspectors would convene at Post and Taback's office in the market or at times in the USDA AMS lunch room at Hunts Point, in Row D. Tr. IV 213. At times, Esposito explained, one person from the group of dishonest inspectors would collect the money for the others. Later they would meet and divide up the money. Tr. IV 216. Some wholesalers preferred to make all their payments to a particular inspector, who would be the collector for the group. Tr. IV 216. The inspectors worked in concert, keeping track of their weekly inspections. Esposito, for example, would meet weekly with wholesaler Paul Steinberg and, effectively present the group's bill for the week. Then Esposito would distribute the shares to the 'group'. Tr. IV 217. USDA supervisor Glenn Jones was part of the group, as he would take care of inspection assignments and other details. In return the inspectors in the 'group' would each pay Jones $100 per week for his role. Tr. IV 218. Esposito stated that other inspectors collected money from other merchants and distributed it, naming Mike Simous [ph] as the inspector who collected from Fruitco, Elias Malibut [ph] as the inspector who collected from Rubin Brothers. For Post and Taback, Esposito stated that Stusiak [ph] and Cashin made the collections. Tr. IV 222. Esposito's legitimate salary from USDA was about $41,000 in 1998 and 1999. Tr. IV 223-224.

Esposito, like Cashman, admitted that he had some expensive habits to maintain. In his case, it was gambling, not women. Tr. IV 224. The amounts he would gamble varied from week to week but went as high as $30,000. Tr. IV 225. Having unusual expenses was not unusual among the dishonest inspectors. Esposito stated that Tommy Vincent, Dave Ball and Mike Simous [ph] were addicted to cocaine. Tr. IV 225. Cashin, he noted, was addicted to strippers, i.e. female 'adult' entertainers. Tr. IV 225. While only an estimate, Esposito believed that somewhere between 30 to 50 percent of the merchants at Hunts Point paid inspectors. Tr. IV 227.

Mr. Esposito stated that he dealt with merchants who would not pay the inspectors by "screw[ing] them." Tr. IV 227-228. **As an example he stated:**

> **. . . if they had a load that was out of good delivery tolerances to where they could get an adjustment, I might make it in (sic) good so where they won't make nothing off of it. . . . I would adjust the inspection. If they had an inspection that might fail good delivery, I might go in there and change — you know, change the numbers and make sure that it passed a good delivery, and they would not get an adjustment on it. Or I would just change temperatures and make the inspection worthless.**

Tr. IV 228.

Mr. Esposito was not afraid that he would be exposed if a merchant asked for an appeal inspection because: ". . .the

people coming down to do the appeal, most of the time, were people that were doing it like me and they would cover me." Tr. IV 229. In fact, as the Court noted, Esposito laughed and smiled when asked about the risk of an appeal inspection. Tr. IV 229. Esposito added that he also laughed because he recalled that Mr. Spinale used to call a lot of appeal inspections on him and that he also called a formal review on him. Tr. IV 230. He said he had a way of dealing with merchants that balked at paying or tried to pay him less than the standard amount. He would tell the merchant: ". . . no, you're going to pay me that much. And when they tried to give me what they wanted to give me, [i.e. less money than demanded], the next time I'd come down, I usually screwed them. Tr. IV 231. By 'screwing them,' Esposito meant making a bad load evaluated as 'good.' Tr. IV 231. When he would 'screw' a merchant, the result was the merchant would get in line with the inspectors' demands. Tr. IV 231. But, even then, the merchant would be effectively punished for not paying right up front because the inspector would not rewrite the original inspection. As Esposito put it: ". . . he [the merchant] would have to eat that one." Tr IV 231. Once a merchant got in line with the program, so to speak, Esposito stated that he would thereafter write up an accurate inspection "[f]rom there on out." Tr. IV 232. Esposito also stated that the inspectors would slow down their inspections whenever they felt someone "was messing" with them. This would cause the inspections to back up. In terms of the number of boxes inspectors were supposed to examine, Esposito stated they did not examine the one percent that were to be examined for an inspection. Instead they would examine about half that number. Tr. IV 234. This was their practice, whether the merchant was paying or not, because it allowed them to do more inspections and more inspections obviously meant more

money. It also benefitted USDA because it increased the office's revenue, as there is a fee for each inspection. Tr. IV 235. Although the inspectors filled out a worksheet, they would simply record that they examined more boxes than they actually examined. Tr. IV 236.

In short, as expressed by Esposito, he felt like he was "God" and that he "wanted money for what I was doing and if you didn't give it to me, then I would do what I had to do to make sure you would . . . by mess[ing] the inspections up that it would do you no good." Tr. IV 240-241. Esposito stated that he tried to force the merchants to make cash payments and that the other inspectors worked the same way. As Esposito put it, it was "a system . . . in place before [he] got there . . ." Tr. IV 241-242. Esposito also maintained that there were differences among the merchants who paid them. Some just paid although the inspectors did no favors for them, but there were others who paid and for whom favors were done. Tr. IV 244, 248. For the first group, they received the normal, fair inspection. Esposito stated that there were a lot of merchants who just paid to paid "to make sure they got a fair inspection." Tr. IV 248. If they didn't pay, those merchants would not receive a fair inspection. Others paid for "help," that is where a delivery was good but the merchant needed a delivery to appear to be in worse condition than it really was. Tr. IV 245. For those, Esposito would make the inspection reflect conditions which were worse than what really existed. Tr. IV 245. Such a "bump" in the numbers meant an increase in the defects recorded of between 2 to 4 percentage points. Tr. IV 246. Significantly, Mr. Esposito stated he was careful not to increase the problems too much and make an unrealistic inspection. Tr. IV 246.

Appendix B

Regarding Mr. Spinale, Esposito affirmed that he knew him and that he did inspections at his places of business: G & T and Tray-Wrap. Tr. IV 249. Esposito stated Mr. Spinale was in the category of those merchants who paid and "just wanted to make sure he got a fair inspection." Tr. IV 250. **Based on the Court's personal observation of Esposito's demeanor when testifying, the Court finds that Esposito was truthful in his characterization of the type of inspections performed for Mr. Spinale. That is to say, the Court accepts as credible Esposito's testimony that Mr. Spinale was paying only for a fair and accurate inspection.** As with all the other witnesses who spoke to the subject, Esposito noted that Mr. Spinale knew his product. Tr. IV 250. As Esposito conceded, he learned from Mr. Spinale's expertise. Tr. IV 256. In fact, Esposito stated that he "learned a lot from [Mr. Spinale]." Tr. IV 250. One of the benefits of paying to get a timely inspection was that Esposito would go to Mr. Spinale's businesses after his normal work day was done and he was on overtime. This was the only way his superior, Wells, would allow an inspection to be done out of the order in which they were called. Tr. IV 250. Specifically, Mr. Esposito denied that Mr. Spinale ever asked him to alter or to falsify an inspection. Tr. IV 251. Nor did he ever "downgrade" an inspection for Mr. Spinale, although he would give the merchant the "benefit of doubt on inspections." Tr. IV 251. Restated, although Mr. Spinale never asked him to do so, Esposito would rate an inspection that was borderline as being "out" of acceptable standards. Tr. IV 251. As noted, the Court finds these assertions of Esposito to be honest. He did this for a number of reasons. These included that Mr. Spinale paid, because he was a "nice guy," and because he finally stopped calling for appeals of

his (Esposito's) inspections. Tr. IV 252. He related that, earlier, Mr. Spinale had appealed Esposito's inspection results "a lot" and even called for a formal review of him. Tr. IV 252. This occurred when Esposito first started and before Mr. Spinale started making cash payments to him. Tr. IV 253.

According to Esposito, the USDA office did not want inspectors failing inspected produce on account of grade.[101] He knew this because when he reported such a problem, his supervisors told him to keep running more samples. Tr. IV 261-262. The objective was, by running more samples, to have the inspection ultimately conclude that there was no failure on grade defects. Tr. IV 262. Also, to avoid this problem, inspectors would tell the merchant to just request a "condition inspection." Tr. IV 263. The upshot of this was that even if he found 8% grade defects, he would write it down as 5%. He would then be able to compensate for this underevaluation by increasing the problems regarding the "condition" defects with the produce. Tr. IV 264. For example, if he found 10% rot, he would list it as 13 %. Tr. IV 265. Esposito also stated that there were times when the produce was in good condition and he would refuse to write an altered inspection and record that there were

101. Esposito, as other witnesses had done, distinguished a grade defect from a condition problem, with the former referring to a problem that will not change such as a misshapen potato or one with "hollow heart." Tr. IV 257- 258. By his best recollection, he stated that for grade defects, 5 % external or 5 % internal, up to a maximum total of 8% defects were allowed. Tr. IV 259. Esposito stated that for Idaho potatoes if he found 8% grade defects he would have to call his office and report that finding, because such potatoes would have been inspected at the shipping point, in Idaho. Tr. IV 260.

problems, because he was unwilling to "stick [his] neck out there too far." Tr. IV 265. This never happened with Mr. Spinale. Tr. IV 266. Mr. Spinale knew his product, and he "would never call in [for an inspection on] stuff that was going to pass." Tr. IV 266.

Esposito was shown RX 1 A, which is also CX 1- 5, relating to inspection certificate K 678086 - 0. He noted that it was "way out of grade," as it reflected 33% total defects and only 9% makes it fail.[102] Tr. IV 270. Because of this, Esposito said it would not be necessary to write down such a high percentage of defects (i.e. 33%) if they didn't exist. One would be asking for an appeal by the shipper if the defects were not really that bad. Tr. IV 271. A load with that percentage of problems was essentially "garbage" in Esposito's view. Tr. IV 270. Directed again to CX 1-5, Esposito stated it was a "condition" inspection, and added that the load description as "light red and red" meant that the whole load was over-ripe. Tr. IV 274. Esposito confirmed that the inspection was not for grade but that had that been part of the inspection, it would have resulted in lowering the percentage of the tomatoes that were considered U.S. number one. Tr. IV 275.

Mr. Esposito was then directed to CX 2 -5, inspection certificate number K 678091-0, RX 2A. He noted that the

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102. Regarding CXI-5, RX I A, K 678086, Esposito stated that it related to a truck load of tomatoes and that typically a load will have 1600 cartons. In this instance, 400 cartons were examined. Tr. V. 48. The temperature on this certificate reflects 54 to 56 degrees, with the normal temperature being between 50 to 60 degrees. Tr. V. 48.

inspection reflected that the produce failed to meet grade, being about three times over the allowable limit for defects. Tr. IV 276. As with the previous inspection, Esposito stated he would not alter such an inspection because it already was clearly bad. Tr. IV 277. Thus, it was unnecessary to alter the inspection and doing so, if it were not accurate, would also provoke an appeal inspection. Tr. IV 277. Esposito also noted that no grade defects were listed for this inspection; that is it covered condition problems only. Tr. IV 278. Had grade defects been included, the inspection results would have been worse. Tr. IV 278. Directed to RX 3 A, inspection certificate number K 679811-0, Esposito, when asked the same questions posed with regard to CX 1 -5 and CX 2- 5, opined that it could possibly represent an altered inspection because it was barely out of grade.[103] Tr. IV 279-280. For CX 4 - 5, RX 4 A, inspection certificate K 765769-5, Esposito noted that it too failed as U.S. number one and was a little out, that is barely failing, on good delivery. Tr. IV 281. Because it was close, Esposito opined that this inspection could also be an altered inspection.[104] Tr. IV 282. For CX 5 - 6, (RX 5A), involving certificate number K 767032-6, Esposito stated it reflected produce that was far out of grade on all tolerances.

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103. This is indicative of Esposito's candor, as he expressed that this *could* have been an altered inspection because it was barely out of grade. However, as discussed earlier, the tomatoes associated with this load were *free*, a fact Mr. Esposito could not have known. As found by the Court, Mr. Spinale never *requested* an inspection on the load. Instead, Cashin had come by for another cash visit and Mr. Spinale felt obliged to pay him.

104. Here too it needs to be emphasized that Mr. Spinale paid the *full* price for these tomatoes and *did not seek an allowance*.

Tr. IV 283. As with the others that were so far out of grade, Esposito stated he would not alter such an inspection, noting that with the degree of decay reflected, it "had to have been there."[105] Tr. IV 284: As for CX 6 - 5, RX 6 A, involving inspection certificate K 767363-5, Esposito also described that load as being "way out on good delivery." Tr. IV 285. For the same reasons already stated, he would not alter such an inspection and accordingly he would consider such an inspection certificate as likely to be accurate. Tr. IV 285. For RX 7 M, involving inspection certificate 767365-0, and pertaining to a load of potatoes, Esposito stated that it too was "way out on good delivery" — by eight or nine percent. Tr. IV 287. As such, he would not alter an inspection reflecting that degree or problems "unless it was there." Tr. IV 288. As to RX 8 C, inspection certificate K 767366-8, dated June 23, 1999, Esposito noted that it was both out on grade and out on good delivery. As the problem was double the allowable limit for soft-rot for example, he concluded it too was likely an accurate inspection. Tr. IV 291. Asked about RX 9 C,[106] inspection certificate K767364, dated June 23, 1999, Esposito stated that it too was way out of tolerances and therefore was unlikely an altered inspection. Tr. IV 295.

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105. As noted, the evidence is unrebutted that the FBI contacted the broker and learned that in fact the tomatoes *were bad. See* the discussion *supra* concerning Mr. Spinale's testimony regarding CX 5.

106. As for RX 9 C, K767364, dealing with potatoes, Esposito stated that generally there were between 1200 and 1300 100 lb sacks. Thus Respondents' counsel was pointing out that, as only 430 sacks were inspected, that number was much less than the entire load. Tr. V. 50.

Esposito added that he would be more leery about altering an inspection of goods arriving by railcar, as the railroad has its own inspectors. Tr. IV 297-298.

The following day, October 29, 2004, Esposito, in a continuation of his testimony, was shown CX 7- 5, relating to railcar number BNFE 18602 and inspection certificate number K 768741-1, performed July 15, 1999. Tr. V. 6. Esposito said this inspection also reflected produce — potatoes — that were very much out of grade, at four or five times the allowable limit. Tr. V. 7. As with the other inspections he discussed that were far out of grade, Esposito said he would be taking a risk by writing such an inspection if in fact the load was not in such poor condition. Tr. V. 8. After some confusion, Esposito acknowledged that the railroad would be likely to examine an inspection with such a poor evaluation. Tr. V. 8-9. CX 8 - 6, RX 12 B, are the same, involving certificate number K 769381-5, and dealing with potatoes arriving on railcar number BNFE 18405 on July 26, 1999. Tr. V 10-11. Because of the symbol "LO" on the inspection certificate, Esposito informed it meant the railcar was loaded, that is the produce was still intact in the railcar. This load too was seriously out-of-grade, being out by 25 percent. Tr. V 10-11. For the same reason he gave numerous times, Esposito stated he would not risk writing such an inspection unless in fact it was in such poor condition. Tr. V.12. As before, he affirmed that the railroad would be likely to examine such a claim of poor condition as well, and this is another reason why an inspector would not risk falsifying an inspection. Tr. V. 12.

Next, Esposito was shown CX 9-16, RX 13 C, dealing with inspection certificate number K 770380- 4, dated August 13, 1999. As with the railcar associated with CX 8- 6, this railcar, BNSF799582, was also loaded. Tr. V. 13. Esposito noted that the potatoes in this load had been damaged by freezing. Tr. V 13- 14. He also observed that the load had been inspected earlier by another USDA inspector as stated on the certificate, which referenced inspection certificate number K 770182- 4, and was dated August 9, 1999. Tr. V. 14. Esposito confirmed that RX 13 B was that earlier inspection to which he referred. In fact, Esposito noted that *he* was the inspector who inspected the load reflected in RX 13 B. Tr. V 15. In both instances, the certificates reflected that the railcar remained loaded with its goods. Tr. V 16. By the time of the second inspection of the load, four days had elapsed and the product had deteriorated further. Tr. V 17-18. Esposito stated firmly that his inspection, as reflected in RX 13, was not an altered inspection. He noted that he knew that the railroad would also be examining the load, as they do that whenever freezing is involved. Tr. V 19.

Esposito acknowledged that Mr. Spinale lent him money. He had been arrested and needed bail money. Tr. V. 21. Mr. Spinale provided him with $17,000 so he could meet bail. Esposito stated that, for the most part, he repaid Mr. Spinale, but acknowledged that he might still owe him "a couple of hundred dollars." Tr. V. 22. Esposito also stated that while he often picked up money on behalf of other inspectors, that arrangement never existed with regard to G&T and Tray-Wrap. Tr. V 23. Esposito also stated that he knew that Cashin borrowed money from other merchants in the market, citing John Thomas of K & H. Thomas told Esposito about this

loan. Tr. V. 25. Thomas also told Esposito that Cashin never paid him back. The money was for his girlfriend/adult entertainer, i.e. "stripper," to have her breasts enlarged and then later to have the breasts reduced. Tr. V. 25. Esposito also stated in response to questions from the Court that Cashin acknowledged to him that he got his girlfriend a "boob job." Tr. V. 29. The information that Cashin later had to pay to have his friend's breasts reduced came from John Thomas of K & H, who told Esposito of the development, or under-development, as it were. Tr. V 29. Esposito said that Cashin got along with the other inspectors, although he characterized him as "strange," and in the last year or two of his employment, Cashin became "even more strange." Tr. V. 26. This time period of "more strange[ness] involved 1997 through October 1999. Tr. V. 27. Esposito also felt that Cashman became embittered by being passed over for USDA promotions. Tr. V. 28. Although Mr. Esposito also acknowledged that Mr. Spinale and G & T brought a lawsuit against him and that, to his knowledge, that suit is still pending, he stated that no promises were made to him in exchange for his testimony in this proceeding. Tr. V. 31. Instead, Esposito explained that he was testifying because he knew that his actions while employed by USDA were wrong and because he recognized that Mr. Spinale had always been fair and nice to him. Tr. V. 32.

On cross-examination Esposito acknowledged that one could alter other items in an inspection besides the condition, such as the number of boxes, the temperature listed on the certificate. Tr. V. 34-35. Esposito explained that while the number of boxes listed might be less than recorded, the blame for this, in his view, was on USDA because of the delay in

getting to requested inspections. Tr. V. 35. Accordingly, he viewed it as understandable that some of the boxes of produce could be sold and accordingly the inspectors would give the merchants the benefit of the doubt as to the original numbers. Tr. V. 35 *He added that this practice was done by all the inspectors, not just the ones who were corrupt.* Tr. V. 36. USDA presented no rebuttal to this assertion either.

As noted, the Court finds the testimony of Mr. Esposito to be credible, particularly where it conflicted with assertions of Mr. Cashin, but also as it supported Mr. Spinale's contention that the payments he made to the inspectors were needed if one wanted rapid and fair inspections.[107]

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107. Were the stakes not so high, the USDA's characterization of Mr. Esposito as "an admittedly corrupt produce inspector who had never even seen the commodities in question" would be amusing. USDA Reply Brief at 6. In pointing to the "corrupt" Mr. Esposito, USDA seems to have forgotten that its star witness was none other than the "admittedly corrupt produce inspector" Cashin. It also sidesteps the fact that Cashin was a witness who could remember no details about the inspections which make up this administrative complaint and whose testimony was relegated to reciting, like a robot, from 302 reports for which he had no independent recollection of the underlying events and which he never even saw until years after they had been created. Further, USDA does not apprehend the purpose of Mr. Esposito's testimony. It was not offered to establish the accuracy of the particular inspections in the Complaint, rather, Esposito's testimony was presented to support the contention that the inspection certificates in issue were likely accurate, because the numbers of defects were so significantly above the acceptable level and the corrupt inspectors were careful not to make an inspection too far above such levels because it would invite a review. Esposito's testimony was also offered, and accepted as credible by the Court,

(Cont'd)

Appendix B

Mr. Craig Bauer also testified on behalf of the Respondents. Directed to the summer of 1999 (i.e. June through September), Bauer was employed by Agri-Empire, in San Jancinto, California, where he was the sales manager, in charge of all red and white potatoes. Tr. V. 60. At that time, Agri sold just reds and whites. Tr. V. 62. Asked whether there were problems during the summer of 1999, Bauer stated there were always problems, but in particular at that time Agri had a field with acres of white potatoes which had stayed in the ground too long. He remembered seeing that these potatoes had problems, such as being misshapen and having lenticels and they were brown instead of white. Tr. V. 63. Bauer, having directly observed the problems with these potatoes, told customers up front that the potatoes from these acres had problems. Tr. V 65. He remembered speaking to Ball Brokerage, i.e. Mr. Harris Cutler, and thought he might have spoken to Mr. Spinale as well. Tr. V 65. Because Agri had a policy that no produce was to be shipped without a price, Bauer assured customers that the price would be adjusted. Tr. V 66. The potatoes were so bad that summer that, as Bauer put it, "I did a lot of begging that summer." Tr. V. 66.

Referring Mr. Bauer to RX 10 E, he recognized it as the standard form used by Ball Brokerage and reflecting that Agri-Empire was the seller. Tr. V. 68. Bauer agreed he was

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(Cont'd)
to establish that Cashin's had a personal and expensive hobby with "female *entertainers*" and needed money far beyond what his USDA income provided, and that the inspectors were extorting merchants such as Mr. Spinale in return for a prompt and accurate inspection.

the one involved in this particular sale. Tr. V. 68. RX 10 C was also identified by Bauer as Agri's invoice to G & T. Bauer agreed that Agri would have received a copy of RX 10 E from Ball. RX 10 F, also identified by Bauer as reflecting the results of the USDA inspection, showed, in Bauer's words, that "these potatoes were awful." Tr. V. 69. The USDA inspection certificate involved here, as reflected in RX 10 B, is the same inspection certificate as reflected in CX 7 - 5. Bauer also identified RX 10 G as the Ball corrected memo reflecting that Agri, agreed to settle on a price of $1.75 FOB, and he noted that his name, referenced as "Craig," appears on RX 10 G. Upon reviewing the documents within RX 10, Bauer agreed that they all related to the same shipment and the transactions involved with it. Tr. V. 71-72. Bauer also agreed that the description of the load in RX 10- F was an accurate description of the problems with the potatoes. Tr. V 87. Not only was Agri satisfied with the settlement, as Bauer put it, "We loved it. That was more than I was expecting to get." Agri was trying to cover the freight, and so he was pleased because not only was the freight covered but G & T also paid $1.75. Tr. V. 73.

Mr. Bauer was then referred to RX 11 A through G, and he first identified RX 11 P as the shipping ticket from Ball. While affirming that Agri's policy is for there to be a price on all that it ships, he noted that the word "open" appears on Ball's ticket. This meant that he had spoken with Ball and agreed that there would not be a price on the potatoes and Agri accepts that the merchant will do the best it can, and further that any written price, such as that reflected on the original invoice, had been "thrown out the window." Tr. V. 74, 78. Bauer also confirmed that all of the exhibits within

RX 1 l related to the same load. Tr. V. 75. Bauer agreed that while the date to be shipped, as reflected on RX 11 P, is July 13th, the document itself is dated August 9th. He speculated that could reflect that the potatoes had arrived and been rejected by G & T. Tr. V. 76. Bauer also agreed that RX 11-O related to the same load of potatoes and it too was dated July 26, 1999. Tr. V. 76. This load, Bauer stated, had "serious problems." Tr. V. 76. **Bauer, speaking with particular importance to Mr. Spinale's reputation and credibility, explained that he was willing to accept an 'open' price because he had been dealing with Mr. Spinale for *thirty* years, and he knew that he would be getting the best possible deal for Agri from Mr. Spinale. Thus, accepting as it does, the credibility of Mr. Bauer, the Court finds that it is totally at odds with Mr. Spinale's longstanding reputation that he would be a party to any scheme to have produce downgraded from its true condition in order to cheat producers.**

Bauer reiterated, with reference to the load identified in RX 11, that Agri was very pleased that they received any money from this load because their chief concern was that the freight cost be covered. Tr. V. 85. Bauer expressed that the description in RX 11-O was an accurate description of the poor condition of these potatoes. Tr. V 86. After all, he had personally observed serious problems with these potatoes *before* they began their 15 day rail journey. Tr. V. 86. Discussing inspection certificate RX 11 B, which is the same inspection certificate for USDA's CX 8 - 7, Bauer noted that Agri did not file an appeal of the inspection certificate results, stating that "it was actually my decision" not to appeal because he knew "these potatoes were in trouble." Tr. V 89. Bauer said the same thing with regard to the RX 10 exhibits; he would not have taken an appeal on the

inspection certificate because he knew those potatoes had problems. Tr. V. 90.

When directed to the group of exhibits making up RX 12, Bauer identified the Agri-Empire invoice to G & T for 2400 sacks of number one size 'A' potatoes, sold at $3.00 per bag, and dated July 13, 1999, and pertaining to railcar BNFE18405. Tr. V 91. RX 12 K, Bauer agreed, was a confirmation of invoice but with no price on it. As before, Bauer stated that he had to put a price on the invoice, but he was "going to hold [the merchant's] hand." Tr. V. 92. The bottom line, from Agri-Empire's perspective in terms of this load, as reflected in the documents comprising RX 12, is that it agreed to a "price [at the] time of arrival" Tr. V. 93. To Bauer, upon examining the RX 12 exhibits, it looked like G & T originally rejected the load from Agri. Tr. V 94. As with the previous group of exhibits, Bauer called the potatoes with this load "ugly," having serious problems and noted that the problems added up to 42 percent. Tr. V 96. Bauer agreed that CX 8- 6, the USDA inspection certificate pertaining to this load, is the same certificate identified in RX 12 B. Tr. V 99. As noted in RX 12 N, Agri agreed to a renegotiated price of 25 cents FOB. Bauer noted his name appears on that exhibit with its reference to 'Craig.' Tr. V 102.

Next, Bauer was referred to the RX 13 documents, A through GG. The original invoice refers to 2400 sacks of potatoes at $3.25 per sack. All the documents in this group relate to the same load, which was on railcar BNSF 799582. Tr. V. 103. As with the other exhibits, the Ball Brokerage ticket refers to "price after sale." RX 13 CC. Bauer confirmed, upon reviewing the temperature tape, RX 13 V, W, X, Y, Z,

and RX 13AA, that it showed that the temperature in the railcar dropped down to between 30 and 35 degrees, which was far too cold for the potatoes. Tr. V. 113. This was consistent, to Bauer, with the accuracy of the inspection certificate reflecting freezing of the potatoes. Tr. V. 113. As stated earlier, the inspection certificate identified in RX 13 C is the same inspection certificate as CX 9 - 16.

Bauer was then directed to RX 10 H, another USDA inspection certificate, number K 662108-0, pertaining to an inspection carried out in Elba, New York. Tr. V 116. This exhibit clearly shows that, even in *other* inspection sites, the product coming from Agri-Empire during the same time period as the inspections forming the basis of USDA's Complaint, was also deemed to be bad. Tr. V. 117. *As the Court noted, this information was clearly relevant.* Tr. V. 117. Bauer noted that the applicant was Markey's Wholesale. RX 10 H. Tr. V 118. Bauer also identified Markey's as a customer of Ball's. Thus, Bauer confirmed that he made this sale through Ball to Markey's. Tr. V. 119. Bauer then noted that the inspection of this load occurred approximately on July 11, 1999. Tr. V. 120, RX 10 H. The inspection, with Bauer again noting that it was conducted out of Elba, New York, showed defects of 44 percent. Bauer reaffirmed that, unfortunately, such a poor product was typical for that period of time for Agri. Tr. V 121. Thus, the problems noted were consistent with the problems with the loads from Agri which were sent to G & T during that same time. Tr. V 121. The same observations were equally true for another Agri load sent to Markey's and inspected in Elba, and bearing inspection certificate number K 662107- 2. Tr. V 122, RX 10 I. In that load 34 percent of the produce was out of grade.

Tr. V 122. Notably, in stark contrast to G & T's actions, some other customers who received these poor potatoes during this time period paid nothing for the loads. Tr. V. 123. In fact, Bauer stated that for at least half of these problem shipments during this time period, Agri received *nothing* for them. Tr. V. 123.

Bauer stated he was aware of the arrests in connection with the Hunts Point matter, including Mr. Spinale's arrest. However, Bauer stated this did not alter his opinion of Mr. Spinale because he has known him for over thirty years. Bauer has held a high opinion of Mr. Spinale, an opinion that included his view that Mr. Spinale is an honest businessman. Tr. V. 128, 132, 133. In fact, when he first learned about the Hunts Point matter, the rumor was that one inspector got caught and cut a deal with prosecutors. Tr. V. 128. The arrest did not cause Bauer to stop doing business with Mr. Spinale, nor did the events alter his opinion "in the least bit." Tr. V. 128, 133. Bauer described Mr. Spinale as one who "expects quality product for a quality price." Tr. V. 129. Essentially, Bauer described Agri's PACA reparation against G & T and other Hunts Point merchants as a no-lose situation, as they only stood to gain by filing a complaint. Tr. V. 130-131. Bauer did not know the outcome of the filing of that complaint by Agri. Tr. V. 132. The Court observes that its conclusions regarding this case are well-supported apart from the testimony of Mr. Bauer, whose testimony the Court found to be credible. Thus Mr. Bauer's testimony only serves to augment the wealth of the evidence and the Court's conclusions. Though absolutely unnecessary for the Respondents to have done so, *as it was not their burden, but rather the government's to establish its claims by a*

preponderance of the evidence, in fact the Respondents have proved their case at least by a preponderance of the evidence.

Paul Cutler also appeared as a witness for the Respondents. This occurred on November 1, 2004, the last day of the hearing. Mr. Cutler, who confirmed that he is unrelated to Harris Cutler, who had testified earlier in this proceeding, stated that he is currently unemployed and that his last job was as a USDA inspector at Hunts Point. Tr. VI 6. Mr. Cutler worked in that capacity from May 1991 until February 2000, when he resigned. He was arrested on October 27, 1999, charged with bribery and RICO violations. Tr. VI 6. Subsequently he pled guilty to one count of bribery, receiving a sentence of 15 months, followed by two years' probation. He actually served thirteen of those months in prison at Allenwood, Pennsylvania. Tr. VI 36. He also was required to forfeit some of the illegal money, approximately $70,000, into a fund. Tr. VI 37, 38. His duties involved inspection of fresh produce at Hunts Point Market and other stores in the New York area. Tr. VI 9. Cashin was the training officer when Cutler arrived at the USDA. Mr. Cutler admitted that he first started receiving cash from merchants for doing inspections around 1992 or 1993. Tr. VI 14. The first time this occurred, as best as he could recall, was at "Fierman's"[ph] which is a merchant or wholesale store at Hunts Point. Fierman expressed to Cutler that he was aware that he could not get prompt inspections from USDA and Fierman also believed that the inspections were not fair. Cutler agreed with these characterizations, stating that the inspectors were pressured to get a lot of inspections done. Tr. VI 15. As a result, according to Mr. Cutler, Fierman offered to pay in order to get a timely and fair inspection. Tr.

VI 15-16. In Cutler's view the inspections were not in fact fair because the merchants would be upset and angry with the delays and when they took out that anger out on the inspectors, the inspectors would not be in a frame of mind to do a fair inspection. Tr. VI 16-17. Accordingly, when an inspection was borderline, and because there is a subjective element to an inspection, Cutler was then inclined *not* to give the merchant the benefit in close calls about the condition of the produce. Tr. VI 17 - 18. Cutler stated that "[b]y the book" they were supposed to sample 1% of the load but because of the pressure to get more done this could not be done, particularly on larger loads, which he defined as including loads with a thousand boxes. Tr. VI 20, 22. In contrast he identified smaller loads as those with 50 to 200 boxes. Tr. VI 23. By this description, the typical load of tomatoes would be classified as a large load, as it would have a thousand or more boxes. Tr. VI 23. Cutler defined the inspector's 'note sheet' as the working paper listing the defects and numbers before the inspector would actually write up the inspection certificate. Tr.VI 20. However, on the note sheet he would not always write down the number of samples he inspected and the number recorded on the sheet might be exaggerated. Tr. VI 21.

Mr. Cutler believed that nine or ten inspectors worked at Hunts Point Market in 1999. This number did not include the supervisors. Tr. VI 27. Cutler stated that there were times when he could not get to all the requested inspections but his supervisor would still urge him to try and get them done. Tr. VI 28. He stated he was not instructed to do the inspections in any particular order, but that it "was generally understood that [they were] to take care of the ones who paid." Tr. VI

28. Cutler stated that he knew there were other inspectors who took cash from the Hunts Point merchants. Although he was not part of the 'group' that took cash, he was nevertheless aware of what they were doing and he would overhear their conversations in the lunchroom, confirming his knowledge. Tr. VI 31, 32. He also observed these inspectors pass cash among themselves. Tr. VI 33. Cutler elaborated that a number of merchants complained that they could not get timely inspections. Tr. VI 39-40. For one of the paying merchants, a Mr. Uribe [ph], Cutler stated that there were times when he would add a few percentage points to the number of defects found in a load, although the merchant did not request that to be done. Tr. VI 40. Though not prompted to increase the number of defects, Cutler stated that he was sympathetic to the merchants' situation where inspections were delayed and since the product is perishable. Tr. VI 41. Cutler conceded that he put pressure on the merchants to pay him. Tr. VI 43. When confronted with a merchant who was angry over the delay, he would tell them "if you want me to do it, pay me." Tr. VI 44. He also conceded that he would list an increased number of boxes above the number that he actually inspected and that a number of his fellow inspectors engaged in this practice. Tr. VI 45.

Cutler also stated that, if faced with a merchant would not pay, and a load that was borderline in terms of passing for allowable defects, he would rate the load as passing. Tr. VI 46. On the other hand, for a paying merchant, when faced with the same borderline situation, he would add two or three percentage points to the defects. Tr. VI 47. Cutler also contended that it was an implicit USDA policy in his office that the inspectors were to increase the number of

containers listed as present at the time of the inspection in order to compensate for the delay in getting the inspection done. Tr. VI 51. He learned about this 'policy' from his fellow inspectors Tr. VI 52. In fact, Cutler maintained that supervisor Mary Ann Stranch, as well as Cashin, told him to increase the numbers. Tr. VI 52. Cutler also stated, as did Esposito, that if an inspection had grade defects above the allowable limit, he was instructed to call the USDA office. Tr. VI 54. The inspectors were told to try and get the inspection changed to a 'condition' inspection. Tr, VI 55-56. If the merchant refused to go along, the inspectors were told to have the inspection result in a passing grade for condition. Tr. V. 56. Cutler also maintained that both supervisor Mike Wells and Washington USDA official Don Paradis [ph] both knew about the cash payments. Tr. VI 59- 60. Cutler never did inspections at G & T or at Tray-Wrap. Tr. VI 63-64. Unlike Cashin and Esposito, Cutler saved his cash payments, putting them in the stock market. Tr. VI 64. Cutler believed that he had power over the Hunts Point merchants because the inspectors could force them to pay to get a correct inspection. Tr. VI 67. Cutler also acknowledged that Mr. Spinale had filed a lawsuit against him, but stated there were no promises made to him as a consequence of his appearance as a witness in this procedure. Tr. VI 67. Mr. Cutler also conceded that he had commenced a lawsuit against Mr. Spinale but that it had been dismissed. Tr. VI 67. The Court found Paul Cutler to be a credible witness who, having served his time, had nothing to gain by testifying on behalf of the Respondents. His testimony, while cumulative, serves to underscore and affirm the testimony of others as further demonstrates that, at least for some of the merchants, the corrupt inspectors were extracting a fee for carrying out a fair and prompt inspection.

Cutler's testimony also provides additional uncontradicted testimony that inspectors were encouraged to do more inspections than they could legitimately accomplish, and to that end, to cut corners in performing such inspections. Further, the uncontradicted testimony is that the USDA management did not want inspections to conclude that a load produce failed to meet grade.

Following the presentation of the Respondents' defense, USDA, on the last day of the hearing called Mr. John Koller as its sanction witness. Koller is employed by USDA in the Perishable Agricultural Commodities Act branch, otherwise known as PACA. Tr. VI 182. As noted, PACA regulates fair trade and good business practices throughout the perishable fruit and vegetable industry. Tr. VI 183. Koller's role in this case was to review the case file and the evidence and to participate in the development of the sanction recommendation.[108] Tr. VI 185.

Interestingly, Mr. Koller conceded during his direct exam about the importance of a prompt inspection: "Well, you know, since we're dealing with a perishable commodity, fruits and vegetables, the pace there is very hectic, and that is because there's always an interest on the wholesalers located on the market to unload the trucks that arrive, because they want to get the product and make it available to the market and for resale to any of its customers that come into the market. . . ." Tr. VI 190-191. Yet, the evidence of record supports the conclusion that the USDA did not have an

108. Currently, Koller's position is a senior marketing specialist in Washington DC. Tr. VI 183. His duties include reviewing disciplinary investigations brought under PACA.

adequate number of inspectors. This shortage contributed to an environment which allowed the corrupt inspectors to demand payments.

As background, Koller explained that a USDA inspection of produce is an unbiased third-party review of a particular lot of produce that's been made available to an inspector — a USDA inspector. The inspection is performed by the Fresh Products branch of the Department of Agriculture. Typically such inspections are requested by the receivers and wholesalers of produce. Inspections are requested if there are questions about the quality and condition of the product. In such cases the USDA is called to inspect the produce and if there are condition defects found that substantiate a breach of contract, the inspection report may be used to show the extent of the problems to the shipper and, ultimately to renegotiate terms on that particular transaction. Tr. VI 194-195. However, as applied to the facts in this case, the Court notes that although the USDA tried later on to create other reasons for a wholesaler to want to bribe an inspector, clearly the reason initially expressed by Mr. Koller was to have an inspector rate a load as worse than its actual condition and thereby allow the wholesaler to negotiate a lower price. The expanded reasons, in the Court's view, came about when

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109. Koller, after asserting that under Section 16 of PACA an act of an agent, etc. is the act of the licensee, which in this case are the Respondents, G & T and Tray-Wrap, then stated that a wholesaler could use a "bribed inspection" to "seek a price adjustment downward" from the shipper or to use it to file a carrier claim with the freight company. Having had the benefit of observing the Respondents evidence in its defense, he added that another 'use' (Cont'd)

USDA realized that it would be unable to show for any of the counts in this proceeding that Mr. Spinale illegitimately brought about an inspection that falsely represented the "product to be worse than its actual condition.[109]

As explained in this decision, the Court finds that as to the specific dates alleged in the Complaint, the produce really was as poor as the inspection certificate reflected and, in any event, Mr. Spinale did not improperly benefit financially from those transactions.

Another problem with USDA's case is its fundamental premise. As Mr. Koller put it citing Section 24 of the PACA: "[The Complainant's position is] that by the Respondents making *bribery* payments to a USDA inspector, it constitutes willful, repeated and flagrant . . . violations of the PACA." (emphasis added) Tr.VI 195. Thus, the duty under PACA Section 24 that it is alleged that the Respondents failed to perform was: ". . . by Respondents making *bribery* payments to obtain false information on the inspection, or to affect the transaction, that this is not in keeping with the fair trade requirements of the act and it corrupts the integrity of the inspection process." Tr. VI 196. Koller added: "when you have a bribery payment made to a produce inspector, that

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could be to notify a shipper that a product doesn't look good but then go ahead and sell the product and create the impression that a 'great favor' was done by selling mediocre product. Tr. VI 197-200. As noted above, not only was this a created fallback argument, but it must also be emphasized that there is absolutely no evidence in this record to show that the 'great favor' approach was used for *any* of the Counts.

affects the credibility of the inspection . . ." Tr.VI 196. Thus the Court notes that a central determination in this case is whether in fact Mr. Spinale *was* bribing the inspectors or whether he was the victim of, as Mr. Spinale expressed it, "soft extortion."

As noted, Koller participated in the sanction recommendation that the Respondents' PACA licenses be revoked. Tr. VI 204. The first factor which led to his recommendation was "that bribery payments to a produce inspector is (sic) one of the most serious violations of the PACA." Tr. VI 204. Yet, although 'bribery' is the central claim here, Koller struggled to define what the term meant. As Mr. Koller put it:

> Well, bribery is where something is offered in exchange for — whether it be for something immediate or anything in the future, anything that would be of use to the person who's interested in affecting someone else's thoughts and processes in what they do.

Tr. VI 205.

The Court then asked Koller, "So, if that's your definition of bribery, if hypothetically money was given to a USDA

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110. Initially Mr. Koller attempted to avoid a direct answer and USDA counsel attempted to speak for him, but the Court wanted to hear from the USDA official who recommended terminating the Respondents' PACA licenses. Tr. VI 206-207. Later, USDA counsel again attempted to repair Mr. Koller's testimony by suggesting that

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inspector and the purpose was to get that inspector to make a prompt, timely inspection and an accurate inspection, does that fit within the definition you just stated or not?" Mr. Koller stated: "Yes, it does." The Court pressed Mr. Koller to explain how that hypothetical fit within his definition of bribery. Mr. Koller eventually responded directly[110] stating:

> Again, it's — with the action itself is an action that's affecting the — that would be affecting an inspector, and it's objectivity of its role as — that person has a role in the service and the process, and that if there's an impression that you will be able to in the future provide assistance to a wholesaler by providing an inspection sooner, than that in itself is cause and effect. You know, they've gotten money and they understand that, you know, hey, if I can provide an inspection for this person who shouldn't be getting it in terms of being queued up for an inspection, that would be an effect.

Tr. VI 207.

The Court still wanted to know from Mr. Koller whether

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CX 1 might "refresh [his] recollection of the meaning of bribery." Tr. VI 208. The Court, noting that Mr. Koller did not testify that he had forgotten what bribery meant, would have none of it. The Court noted that Koller, as the person responsible for testimony regarding the appropriate penalty had voiced his understanding of bribery. Tr. VI 208-209. This admonition however did not stop USDA counsel from making a last stab at trying to undo Mr. Koller's understanding of bribery. The Court had to remind USDA counsel that this had been ruled upon.

his answer had changed in terms of bribery if he "assumed that all this begins with the inspector initiating the requirement for money? What if the impetus comes from the inspectors? Do you still see that as no different in terms of your understanding of the term bribery?" Mr. Koller answered: "I would say it's no different." Tr. VI 207. This Court does not agree.

While Mr. Koller discerned no difference, this Court does see one, and believes that if the corrupt inspectors were extorting Mr. Spinale, at a minimum such a determination must inform any sanction imposed. The First Circuit considers such a determination to be relevant as well.[111] In *Columbia Packing Company, Inc. v. USDA*, 563 F.2d 495 (1st Cir. 1977), that court noted, in the context of a FOIA request, that the packing company, which as with the Respondents here were at risk of losing the federal inspection service, had a right to see the personnel records of the former USDA meat inspectors who had been convicted of bribery, *in order to show that the company was a victim of extortion.* The court added that if those records supported the contention that the company was being extorted, that would present "a posture 'tending to mitigate its conduct.'" *Id.* at 498. *Further, the court expressed that if the inspectors were engaged in extortion, the packing company should prevail. Id* at 501.

Mr. Koller then continued with his view of the factors which warranted revocation of the Respondents' PACA licenses. His second factor was the "role that the inspection

111. *See also, United States v. Alfisi*, 308 F.3d 144, (2nd Cir. 2002), which also recognized this distinction. The *Alfisi* decision is discussed herein.

plays in the industry in terms of being able to quickly resolve any disputes that have transpired in produce transaction . . . it's important . . . that this inspection be accurate and impartial and that it is objective . . . in regard to the quality and condition of the product that has been inspected at that time. When you have any suspicion that an inspection has been tainted because of a bribery payment made to a produce inspector to affect the outcome of the inspection certificate, . . . including the quality and condition of the product and also in terms of its accuracy, that this undermines the credibility of the inspection process . . . and it could result in tens of thousands of dollars in unjustified adjustments to any produce transactions." Koller added their were other 'factors,' citing the "competitive factor." By this he meant "a wholesaler who is paying bribes to get adjustments to an invoice. They could use this adjustment to sell a product for a lesser value than what may be called for in the market. . . an example . . . would be . . . a wholesaler . . . who has received a particular commodity and they've bribed and received adjustments on the invoice, and they turn around and sell the product at a lower price compared to other competitors on the market. . . . Tr. VI 209-211. Koller also stated there was a deterrent factor . . . bribery payments are a serious violation and . . . a serious revocation sanction needs

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112. Of course, as has been pointed out several times, Mr. Spinale said no such thing.

113. It is indeed unfortunate that the USDA continually, in its testimony and its briefs mischaracterized the evidence. As but one example, Mr. Koller's statement that Mr. Spinale admitted paying *bribes* as far back as 1991 is flat out incorrect. Whether USDA has ignorantly confused the important distinction between bribery and extortion, or intentionally done so, neither is acceptable in a legal proceeding.

to be imposed . . . . Tr. VI 211. Koller then added, as another factor, the 'aggravating' factor, as "Mr. Spinale has said that he had been paying bribes to Mr. Cashin as far back as 1991[112] . . . ." Tr. VI 211. The problem with Koller's (and USDA's) analysis is that it collapses if the Court does not find bribery.[113] For the many reasons set forth in this decision this Court finds that bribery has not been established, that the USDA did not present a prima facie case, and, assuming arguendo that those were established, the Respondent's unrebutted evidence established that Mr. Spinale was a victim of soft extortion from the cabal of convicted USDA inspectors.

When USDA counsel asked if it would change his sanction recommendation if Mr. Spinale "made bribe payments to an inspector in order to obtain a fair inspection," Koller said "no" because what "we have is that the bribery payment took place, this is an illegal payment, and that is something that Mr. Spinale elected to do.[114] And by making these bribery payments, is not in keeping with the fair trading requirements of the act in terms of the Respondents not upholding that responsibility. And also, it's, you know, unfair

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114. This assertion belied the claim of USDA that it had to wait until the Respondents had put on their case before the sanction witness testified. One of the reasons, in addition to the claim that this was the customary practice, was that it was possible that the sanction witness might change his/her view upon hearing a respondent's evidence. The Court found no basis in the procedural rules for this claim that the sanction testimony should await the conclusion of a respondent's case and it seems obvious that this is simply a strategic move to allow the sanction witness to make any necessary adjustments before expressing the sanction testimony.

to the — his fellow wholesalers on the Hunts Point Market in terms of paying these bribes to affect the inspection process overall." Tr. VI 212. Nor did Koller see the fact that Cashin, as a USDA employee, was receiving the payments as a basis for impacting his penalty recommendation because "bribery . . . is one the most serious violations of the PACA . . ." Tr. VI 215. For the same reason, bribery, Koller did not feel it would be sufficient to impose acivil penalty in lieu of a license revocation. Tr. VI 215. Not surprisingly, Koller would not alter his view when asked to assume that the payments were involuntary because, from his perspective, Mr. Spinale "had a choice of not making the payments — the *bribery* payments. . . ." Tr. VI 216. Obviously, Koller could not, even for purposes of a hypothetical, put aside his presumption that bribery occurred. However, while Mr. Koller could not conceive of a penalty short of license revocation, he conceded that the Court has the authority to recommend a sanction short of a license revocation. Tr. VI 249, 251. Koller expressed the view that a reprimand or a warning letter were not options that he was aware of, however he did believe that a license suspension was available as a sanction. Tr. 251-252. Although he knew of no minimum suspension, he believed that the maximum suspension was 90 days. Tr. VI 252. Koller stated he knew of no other available sanctions. Tr. VI 252.

III. DISCUSSION WITH ADDITIONAL FINDINGS

As part of the analysis of this case, it is important to step back for an overview of the government's evidence. When the USDA rested, its case only had two theoretical

legs left standing in support of its claim: the testimony of Cashin and the Mr. Spinale's guilty plea to a single count of bribery. Both of these legs, in terms of establishing the USDA's claims and the sanction it seeks, have serious and irreparable flaws. First, regarding Cashin, the Court finds that in all aspects where his testimony conflicted with Mr. Spinale's testimony, Mr. Spinale's testimony was credible and Cashin's was not.[115] The Court paid particular attention to the demeanor, tone, and other indicia of believability during the testimony of these witnesses and concludes that where their testimony conflicted, Cashin did not tell the truth and that Mr. Spinale was truthful. Of course, the Court's

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115. It is well established that reviewing courts do not generally usurp a trial court's determinations regarding credibility of witnesses. *United States v. Turner*, 995 F.2d 1357, 1362 (6th Cir.), *cert. denied*, 510 U.S. 904, (1993). Thus, an administrative law judge's "credibility determination will not be disturbed unless it is patently wrong." *Cannon v. Apfel*, 213 F.3d 970, 977. The reasons for this are obvious. The trial judge, when also serving as the trier of fact, "has the best 'opportunity to observe the verbal and nonverbal behavior of the witnesses focusing on the subject's reactions and responses ... their facial expressions, attitudes, tone of voice, eye contact, posture and body movements' as well as confused or nervous speech patterns in contrast with merely looking at the cold pages of an appellate record." *United States v. Tolson*, 988 F.2d 1494 at 1497 (7th Cir. 1993). Thus, the judge, listening to the testimony, is in the best position to observe, weigh, and evaluate a witness' verbal as well as nonverbal behavior. *Knight v. Chater*, 55 F.3d 309 (7th Cir. 1995). Accordingly it is well settled that a reviewing court should not reweigh the evidence or reconsider credibility determinations made by an ALJ. *Prince v. Sullivan*, 993 F.2d 598, 601-602 (7th Cir. 1991). In sum, the administrative law judge's determinations regarding credibility are entitled to great deference. *Chen v. General Accounting Office*, 821 F.2d 732, 738 (D.C. Cir 1987), *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962)

credibility determination did not rest entirely on those assessments. Other witnesses, from Mr. Harris Cutler to Mr. Craig Bauer to Edmund Esposito and to Paul Cutler, all provided substantial support for this Court to conclude that Cashin's operation was nothing more than a "holdup" of Mr. Spinale, with Cashin only missing the formality of wearing a mask.

Thus, regarding Cashin, the Court finds that he was extracting a personal "fee" for every *visit* to Mr. Spinale's place of business and that in no instance was Mr. Spinale benefitting from those visits in the critical ways that USDA asserts.[116] That is to say, in no instance among the dates cited

116. As mentioned above, the Court has found it troubling that the USDA in its post-hearing briefs uses the terms "bribes" and "illegal payments" interchangeably. As one example, among many, USDA states that the Respondent admitted that it *bribed* inspectors on many earlier occasions. USDA Reply Brief at 3, 4. As another example, USDA states that "Respondents in the instant case are relying on the accuracy of the inspection certificates *that they admit were the result of bribery*." USDA Reply Brief at 6 (emphasis added). As a third example, USDA states "Mr. Spinale admitted he had been regularly paying bribes to William Cashin for seven years prior to 1998." USDA Reply Brief at 9. Of course, the Respondents never admitted in this proceeding that payments made by Mr. Spinale were *bribe* payments. Rather, Respondents have contended that they were the victims of 'soft extortion' by inspectors like Cashin. It is unfortunate that USDA has mischaracterized the Respondents' position. Regrettably, mischaracterizations by USDA were not limited to their description of the Respondents' statements. For example, citing Tr. I, 87, 104, USDA states that "Mr. Cashin testified that he altered the inspection certificate" regarding a March 24, 1999 tomato inspection, but as the transcript clearly shows, the fact is that Cashin had no ability to state, other than in generalities about his conduct,

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in the Complaint[117] did Mr. Spinale seek or obtain from Cashin an inspection report which downgraded a load of produce from its actual condition. Mr. Spinale, like at least some other merchants at Hunts Point, was paying Cashin in order to receive a prompt and accurate inspection. As USDA recognized, both through witnesses and in its statements through counsel, these inspections involve produce and as such, if they are to be useful, it is critical that inspections be carried out promptly. Because of that fact, Cashin and his cabal of corrupt cronies knew they had merchants like Mr. Spinale over a barrel.[118] The merchants could pay them or risk either a delayed inspection or an inspection which rated produce as acceptable when an honest assessment would

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that the particular inspection was altered. It is one thing to make arguments, it is another to concoct facts to support arguments. As still another example, in addressing the April 23,1999 tomato inspection for which the USDA was not able to rebut the Respondents' assertion that it did not request an inspection for that load, USDA leaves the evidentiary realm and engages in rank speculation asserting "it is *plausible* that Mr. Spinale showed this inspection certificate to . . . brokers, sales managers, etc." to obtain a benefit. USDA Reply Brief at 12. (emphasis added). Conjecture is not the equivalent of evidence.

117. No inference should be made that this Court has a different view about inspections conducted prior to those cited in the Complaint. Rather, unlike the USDA, the Court remains focused on the issues before it which are circumscribed by the instances and dates cited in the Complaint.

118. The Court does not need to reach the Respondent's contention that Cashin, disappointed that Mr. Spinale would not 'loan' him money had a motive to try and entrap him. This should not be construed as a rejection of that claim but simply that Cashin's motives regarding Mr. Spinale in collaborating with the FBI were not significant to the Court's determinations in this case.

determine otherwise. **In a real sense, in addition to the Court's observations of Mr. Spinale and Cashin and the other witnesses who supported Mr. Spinale at the hearing, the credibility determination can also be viewed as a choice between, on one hand, an acknowledged crook, who was able to 'cash-in' on a merchant who dealt with a fragile and time-sensitive commodity, a man who acknowledged spending *nineteen years* taking payments from merchants at Hunts Point, a man who had a compelling need to engage in his extortion of merchants like Mr. Spinale to support the great demands for cash required by the strippers he was addicted to, and, on the other hand, a man who, after serving his country in the Korean War, spent thirty-two years in the produce business, and had a spotless reputation and a respected expertise in tomatoes and potatoes. Viewing the evidence in its entirety this is not a hard determination to make.**

Further, the contention advanced by USDA, that Mr. Spinale should have stood up to the corrupt cabal of inspectors, shows a remarkable disconnect from the real world by those have not had to deal with it, except as regulators. It borders on the outrageous to suggest that Mr. Spinale should have taken a more courageous stance in dealing with a corrupt group of federal inspectors, especially not knowing the extent and depth of corruption that he was facing. First, he had already learned that the bureaucracy was much more potent than him. Though many witnesses acknowledged that he is an expert where tomatoes and potatoes are concerned, Mr. Spinale's unrebutted testimony established that he could never win when he appealed the results of an inspection. Losing against the bureaucracy is

not exactly a new story. Further, when he voiced other complaints to the USDA, his concerns were brushed aside. As the Court observed, USDA's position is akin to the idea that a motorist, pulled over by a corrupt state trooper for speeding when no violation had occurred, and subtly presented with the option to make a 'payment' or face the bureaucratic machinery by appealing, and though knowing full well that defeat would be a near certainty, the motorist should nevertheless stand one's ground. With good reason, few take on such a challenge. It should also be pointed out that this was not a case of a rogue inspector, acting alone. The breadth of the indictments and convictions demonstrates that the Hunts Point USDA office was contaminated with corruption and that other problems with inspections existed such as faking the number of items inspected and rigging the outcome when grade defects are alleged. Under these egregious conditions, it takes some chutzpah for the USDA to seek to drive a merchant like Mr. Spinale out of the fruit and vegetable business. However, because such payments under any circumstances are still wrong, Mr. Spinale should not have caved in to the corrupt demands. The Court notes that Mr. Spinale recognizes this and observes that this 73 year-old man has already paid a significant price for that, by virtue of the ordeal of the criminal indictment, the plea to a single count, the associated legal representation fees, the

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119. No one should confuse these observations as suggestive that this Court's determinations were based on anything other than its evaluation of the evidence of record and the Court's credibility determinations. Still, the observations are worth noting if for no other purpose than to contrast the price Mr. Spinale has already paid with the treatment received by the USDA's William Cashin for the nineteen years of corrupt activity by the government's own inspector.

significant fine of $30,000 that he paid, and the ignominy of home confinement with a monitoring device, along with five years' probation.[119]

Regarding the other "leg" upon which USDA supports its case, Mr. Spinale's guilty plea to a *single* count of the nine count indictment, the Court has already spoken to this in its oral ruling on the USDA's motion for summary judgment. Perhaps foreshadowing a recognized weakness with its own case, USDA attempted to avoid entirely the burden of proving violations by Mr. Spinale by bootstrapping the single plea and converting it into its entire case. Any analysis of Mr. Spinale's plea would be disingenuous in the extreme if it began and ended with the initial words spoken by Mr. Spinale. While it is true that when before the Honorable Ronald J. Ellis, Magistrate, on January 26, 2001, Mr. Spinale stated: "On August 13, 1999 I paid money to Bill Cashin for the purpose of influencing the outcome of his inspection report on a load of potatoes. I told him the specific amount I wanted him to put in the inspection report."

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120. While Mr. Spinale also stated: "On the other dates in the Indictment, I paid Mr. Cashin $100 per inspection to influence the outcome of the report," the fact of the matter is that he pled guilty *only* to Count 9. Count 9 is the only count that pertains to August 13, 1999, which is the only date associated with Mr. Spinale's plea of guilty to a single count of bribery. *See* Plea Transcript at pgs. 3 and 11. Therefore the statement regarding the "other dates in the Indictment," in addition to being vague and subject to explanation as to what was meant by the phrase "to influence the outcome of the report," is also superfluous and technically not part of the plea, *which was limited solely to Count 9.*

Appendix B

Upon finishing his plea, and without interruption nor prompting by any question, Mr. Spinale *immediately* added:

> Your honor, I would like to state I never intended to defraud the shippers who had sent me the produce."[120]

Indictment Tr. at 10 -11.

Although there are cases standing for the principle that a plea operates to bind one to its terms, every case analyzing the effect of a plea must be evaluated on its own attendant facts. In addition, USDA's blindness to the fact that people enter guilty pleas for reasons other than being guilty in fact, is another example of its inability to take into account real world decisions. Factors such as: one's age, especially if one is of advanced years; the correct assumption that, even where one is in fact innocent, a jury's decision is unpredictable; and the enormous cost associated with defending oneself, are all real world considerations that enter the equation for anyone facing criminal charges. When those real world considerations are juxtaposed against the option of pleading to a single count and the elimination of any jail time, it would not be irrational for one to "choose" to plead guilty. Indeed, it can be credibly asserted that it would be an irrational decision for an innocent person to refuse such a plea arrangement.

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121. The motion was titled "Order Regarding Motion for Decision Without Hearing by Reason of Admissions and Motion to Take Official Notice." Although the Court stated its intention to issue a formal order on the motion, it later decided that, having denied the motion and as the hearing thereafter proceeded with both sides fully presenting their case, it was unnecessary to do so.

Appendix B

The court's views regarding Mr. Spinale's guilty plea were addressed at the outset of this PACA hearing. At that time the Court issued its ruling from the bench regarding the Complainant's Motion for a Decision Without a Hearing.[121] Excerpts (with corrections) from those remarks from transcript pages Tr I 5 - 20, along with additional comments, follow:

[T]he Motion before the Court rests upon the transcripts of the guilty plea made by Anthony Spinale and the related sentencing hearing in Southern District of New York Criminal Action 99-CR-1093. The Motion is also based on statements made in the civil action brought by Mr. Spinale and G&T, docket number 03-CV-01704. That civil action alleged that the United States Department of Agriculture, acting through its inspectors, *extorted* money from the Plaintiffs in violation of Section 1962(c) of the Racketeer-Influenced and Corrupt Organizations Act, better known as RICO .

While the Complaint references ten alleged instances of illegal payments, Mr. Spinale pled guilty [in the criminal indictment] to *one* count of Bribery of a Public Official. The Department of Agriculture now states that because Mr. Spinale pled guilty to count nine of the indictment and because he asserted in his civil action that illegal payments were made to agriculture inspectors, which illegal payments include the same illegal payments identified in this complaint, that Mr. Spinale should now be estopped from claiming that no illegal payment took place in this administrative proceeding. Thus, the Department of Agriculture is contending that the guilty plea, when coupled with the statements in Mr. Spinale's civil action, remove any issues

of dispute as to material facts, and, as a consequence, a decision without a hearing is warranted.

[I]n brief, the complaint in this case charges that the Respondents G&T and Tray-Wrap, both licensed under the Perishable Agricultural Commodities Act . . . [violated that Act in that] that those two companies made illegal payments to a United States Department of Agriculture inspector in connection with federal inspections of perishable commodities. In particular, the Complaint cites four instances of such alleged illegal payments made by G&T during July and August of 1999 and six instances of illegal payments made by Tray-Wrap from March through June of 1999. On the basis of these ten alleged illegal payments, the Department of Agriculture asserts that the Respondents' acts were willful, flagrant, and repeated violations of Section 2.4 of PACA "by failing, without reasonable cause," and this is a quote from that particular section, "to perform any specification or duty, expressed or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate of foreign commerce." [The Court] would love to meet the draftsman of that particular provision.

With that aside, the Court notes that on January 9, 2004, Magistrate James C. Francis IV issued his report and recommendation regarding a motion to dismiss the aforementioned RICO action brought by Respondents. That recommendation urging dismissal of the action was based on several grounds, including the determination that the United States is not a person under RICO. While the magistrate noted that a criminal conviction, including one

arrived at through a plea, constitutes estoppel in a subsequent civil proceeding, *such estoppel is limited to those matters determined by the judgment in the criminal case.* From the Court's perspective, it is significant that the magistrate also stated that it is possible.to read the RICO action as alleging that Mr. Spinale's guilty plea does not bar his claim, because the bribes he paid were extorted from him by the inspector defendants. While the magistrate also determined that Mr. Spinale's guilty plea waived all non-jurisdictional defenses and thereby eliminated an extortion defense, that court added, "*It may be that the Plaintiffs are also claiming damage on the theory that they received inaccurate inspections when they refused to bribe the inspector defendants, implying that the inspector defendants deliberately misgraded their produce in order to coerce them into paying the bribes.*" (emphasis added). The magistrate stated that if that is the Plaintiffs' assertion, they should be allowed to assert such a claim and that such a claim should be allowed to be re-pled. Of course, this is exactly the defense that the Respondents ably presented in this hearing.

In adopting the magistrate's recommendation, Judge Wood held that judicial estoppel did apply with the Respondents' RICO action, not because of Mr. Spinale's guilty plea, "but rather because of the facts he asserted in connection with that Plea." Judge Wood's Order, at pages 9 and 10. However, bearing in mind that the issues in this administrative Complaint are whether G&T and Tray-Wrap willfully, flagrantly, and repeatedly violated Section 2.4 of the PACA by making illegal payments on the ten dates cited in the complaint and further whether, on consideration of the attendant facts, revocation of the Respondents' licenses

is warranted, it is apparent to this Court that the facts asserted in connection with the plea were, at best, equivocal. As agriculture itself concedes, the charges against Mr. Spinale for the alleged Tray-Wrap bribes were dropped. With that state of affairs, Agriculture is left to assert that the Tray-Wrap claims were revived for purposes of its Motion for a Decision Without a Hearing on the basis of the Respondents' RICO complaint.

When before Magistrate Ellis on January 26, 2001, and asked what he did, Mr. Spinale stated in what was obviously a prepared statement: "On August 13, paid money to Bill Cashin . . . for the purpose of influencing the outcome of his inspection report on a load of potatoes. I told him the specific amount I wanted him to put in the inspection report. On the other dates in the indictment, I paid Mr. Cashin $100 per inspection to influence the outcome of the report."

From the Court's perspective, it is noteworthy that Mr. Spinale, in making that statement, did not state that he sought a report that would overstate the extent of defects in the produce being inspected, only that he paid Mr. Cashin to "influence the outcome of the reports". It is the Respondents' contention in this proceeding, just as it was in connection with their ultimately dismissed RICO action against the USDA named inspectors, that the inspectors were extorting them, and that they only way that they could obtain a fair and accurate assessment of the condition of the produce for which inspections had been requested was to pay off those inspectors. And that is the heart of the matter in this case. Obviously, it is going to be critical for [the Court] to make credibility assessments in this case. [The Court will] have to

determine which version is more credible, and that will depend upon my assessment of all of the factors that a judge [and] a jury would need to consider. In this instance, the Court acts as both the fact finder and the determiner of law. In terms of assessing credibility, [the Court will] have to assess the demeanor and believability of the witnesses, including their responses upon cross-examination, and make [its] best effort to determine where the truth lies.

Now [the Court] just referred to Mr. Spinale's statement at the time he made his plea. The plea, however, can not be read in isolation, as Mr. Spinale's statement at sentencing augments his plea. When before a Judge Casey for sentencing on August 21, 2001, Mr. Spinale stated:

> I accepted full responsibility for what I did. I also said I never intended to defraud the shipment of semi-produce.[122]

The Court notes that Agriculture looks for support to the Decision in *Post & Taback*, PACA Docket number D-01-0026, issued December 16, 2003, and in which decision

122. The Court noted that Mr. Spinale then added: "If you would like me to expand on that or explain it, I would be more than happy to." This Court noted that Mr. Spinale's remarks after that seemed to be somewhat disjointed, as he then added: "The last thing I want to say, Your Honor, is that I am a hardworking guy, and I never did anything bad in my life, and I think I deserve a break. That is all I have to say." One can only speculate why more was not stated but there is a risk that saying too much can unravel a guilty plea. Whatever may have been the reason, it does not detract from the critical and consistent statement by Mr. Spinale, both in his plea and at sentencing, that he was not admitting to defrauding anyone.

it was referenced that Post and Taback's employee, Alfisi, had been convicted of *bribing* an agriculture inspector in connection with produce inspections. [The Court] note[s] that [case] involved the very same inspector who has been subpoenaed for this proceeding and who is at the heart of this matter in terms of the Government's case, at least, seems to be one of the critical witnesses. That's Mr. William Cashin. The same Mr. Cashin was involved in the *Post & Taback* decision.

A few additional comments beyond those made in the Court's ruling on Complainant's Motion for Decision Without Hearing by Reason of Admissions and Motion to Take Official Notice are in order. *In re: Post & Taback, Inc.*,[123] PACA Docket No. D-01-0026, December 16, 2003, 2003 WL 22965185 (U.S.D.A.), Decision of the Judicial Officer, William G. Jenson, it was noted that Post & Taback's employee, Alfisi, *bribed*[124] a USDA inspector and used the fraudulent information generated through that bribe to "make false and misleading statements to produce sellers." As noted, Alfisi was paying the same William Cashin involved in this

123. A significant part of the decision in *Post & Taback* dealt with the Respondent's failure to make full and prompt payments, an aspect that has no relevance to this case.

124. *See also*, on the subject of bribery under this section, *JSG Trading v. USDA*, 176 F.3d 536 (D.C. Cir. 1999), *In re Tipco, Inc.*, 50 Agric. Dec. 871, 1991 WL 295153 (1991), and *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1990 WL 320442 (1990).

125. As noted, as a consequence of the plea, all charges against Tray-Wrap were dropped.

proceeding. One of the distinctions between *Post & Taback* and this case, is that Cashin testified his inspections for Alfisi would go over the good delivery marks. Cashin offered no such testimony regarding the inspections of G & T and Tray-Wrap. Although the Judicial Officer held that USDA did not have to introduce independent evidence of bribery in the administrative proceeding where there had been a trial and a finding of bribery on Alfisi's part, it must be noted that in Mr. Spinale's case there was no trial but rather a plea to a single count involving one of the Respondents — G & T.[125] The Judicial Officer also noted that in Alfisi's case[126] there was no evidence of extortion, and this is another distinction

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126. After his trial, which took six days and for which the jury deliberated for four days, Alfisi appealed his conviction. The Second Circuit noted in that appeal that to support a bribery charge, a 'corrupt' intent must be shown and that this means a "specific intent to give . . . something of value *in exchange* for an official act." Thus, it distinguished bribery from an unlawful gratuity, as the latter lacks the *quid pro quo*. The court, recognizing the key difference, held that the jury instructions were "sufficiently specific" to "spell out the difference" between the two. *United States v. Alfisi*, 308 F. 3d 144, (2nd Cir. 2002) (emphasis in original). The point is that the jury could have found that Alfisi's payments were unlawful gratuities made for or because of an official act, namely to have Cashin perform his job faithfully but, after four days of deliberation, determined that bribery occurred. As the fact finder here, this Court has found that Mr. Spinale was not *bribing* Cashin but that unlawful gratuities were made. These unlawful gratuities, as should be abundantly clear in this decision by now, were made because the corrupt inspector, Cashin, was demanding payments each time he made a *visit* to the Respondents' place of business, if the Respondents wanted a fair, accurate and timely inspection.

between the cases. Another difference between *Post & Taback* and this case is that the administrative law judge in *Post & Taback* "did not make a finding with respect to [the] unlawful gratuities and did not explain his failure to find that Mark Alfisi paid these unlawful gratuities. . . . [and accordingly] [b]ased **on the record** before [the Judicial Officer it was determined that] . . . Alfisi paid unlawful gratuities. . . ." *Id.* at * 15 (emphasis added). Still another distinction between the cases is that in *Post & Taback* the violations were repeated because, as the Judicial Officer noted, "repeated means more than one." *Id.* at *18. In this case, *at most*,[127] there is evidence to support only one violation: the single count pled by Mr. Spinale.

In terms of the appropriate sanction, the Judicial Officer noted that the sanction should take into account "all relevant circumstances." *Id.* at * 19. This Court also considers it noteworthy that as the Respondent did not have a PACA license, the appropriate sanction was "the publication of the facts and circumstances of Respondent's violations."[128] *Id.* at * 19.

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127. For the reasons already set forth in this decision this Court believes it is appropriate to look at Mr. Spinale's plea in its full context and that when that is done the plea should not be used to establish even one violation of the PACA in this proceeding. However, even if an approach is taken that ignores the context of the full plea, it is noted that there was no trial evidence, as in Alfisi's case, and that, a single violation, as noted by the Judicial Officer, can not establish repeated violations. In *Post & Taback*, the USDA's sanction witness based his recommendation in part on "the number of violations." *Id.* at * 19.

128. For the reasons expressed, this Court believes, based on the record, that dismissal is the appropriate result here but that at most any sanction should be limited to a publication of the facts and circumstances derived from the record.

Appendix B

The Court also notes that the Judicial officer, while speaking about the responsibility of wholesalers and other produce merchants, has spoken to the importance of honest inspectors. In the case of *Greenville Packing Company* at 59 Agricultural Decisions 194 (2000), it was stated that "[b]ribery goes to the heart of the inspection system. We assign inspectors into that establishment to be impartial. They must be independent figures. . . . If inspectors accept bribes . . . it compromises their integrity as well as the integrity of the inspection system and the confidence that consumers put in the product that bears the mark of inspection."[129] 59 Agric. Dec. at 208. Obviously, the compromise to the integrity of the inspectors and the inspection system is greater where the initiation of demands for money originates from the inspectors themselves. It is also worth noting that, although Alphesy had been convicted of bribery, this did not operate to deny Post and Taback from an administrative hearing on its license revocation proceeding. While Mr. Spinale's plea to count nine and the statements in the RICO complaint filed by G&T and by Mr. Spinale, collectively concede that illegal payments took place, these hardly constitute sufficient cause to warrant revocation of the licenses of G&T and Tray-Wrap when the central contention of the Respondents is that they were being extorted by the Agriculture inspectors in that, if they wanted an accurate inspection of the produce, they would have to pay off the inspectors to receive one.

In the ruling from the bench at the outset of the hearing in this case, the Court also noted the USDA's position that even if the Respondents' contentions that they were being

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129. The principle of an honest inspectorate takes on additional gravitas when it is determined as here that soft extortion, not bribery, was at work.

extorted to obtain an accurate inspection are true, then these individuals had a duty to stand up against the extorting inspectors. Thus, it is accurate to state that Agriculture contends, from the Court's understanding of its argument, that the *Respondents had a duty to regulate the regulators.*

Where the issue is the appropriateness of revoking PACA licenses and given that the statutory provisions provide that a license may be revoked where there are such violations, it is incumbent upon this Court to fully appreciate the circumstances surrounding the illegal payments. Indeed, as noted in *S. S. Farms Linn County, Inc.* at 50 Agricultural Decisions 473, 476, it was stated that the sanction in each case is to be determined by examining the nature of the violations in relation to the remedial purpose of the regulatory statute involved along with all relevant circumstances always giving appropriate weight, of course, to the recommendations of the administrative officials charged with responsibility for achieving the Congressional purpose.

In its ruling from the bench this Court noted that the issue of the effect of the guilty plea is a complex matter. Commentators also have recognized that the preclusive effect of a guilty plea is such a complex matter. For example, an extensive article at 70 Iowa Law Review 27, October 1984, makes that observation. This is equally true when the issue involves the effect of guilty pleas when dealing with subsequent administrative hearings. It has also been observed by these commentators that the existence of a factual basis for a guilty plea does not mean that the individual agrees that he or she committed the crime. Rather, it represents an acknowledgment that there is sufficient evidence to conclude

that the defendant has acted as charged. Courts and commentators have recognized that the reality is that defendants enter guilty pleas for a variety of reasons, not the least of which is the incentive to obtain a lighter sentence when facing the possibility of a more significant one. Thus, while a guilty plea serves as an admission, many jurisdictions do not regard it as conclusive in subsequent civil proceedings. The Court also noted a brief article on this subject at 22 Colorado Lawyer 1889, September 1993

In researching this matter, the Court also determined that the effect of a guilty plea is largely determined upon the particular state where the proceedings is occurring. And so in this case, one could look to the State of New York. As a matter of state law, New York takes the position that a guilty plea may have a preclusive effect in a subsequent civil action, but that the party asserting such effect must demonstrate that the issue is *identical to* and *necessarily decided* at the prior proceeding, and further that the party seeking to be precluded from re-litigating the issue had a full and fair opportunity to contest it in the prior proceeding. In this administrative litigation, seeking as it does the revocation of G&T's and Tray-Wrap's PCA license, the most basic observation is that the criminal plea relied upon by Agriculture was made by Mr. Spinale, not by the Respondent corporations cited here. Accordingly the Court makes the observation that neither G&T, nor Tray-Wrap, the Respondents in this proceeding, were part of the criminal proceeding. Accordingly, it is without merit to assert that the Respondents had a full and fair opportunity to contest the prior Determination.

Appendix B

As the foregoing discussion and findings amply demonstrate, the sanction sought by the USDA must fail as it has not been shown that the Respondents committed willful, flagrant and repeated violations of Section 2(4) of the PACA, 7 U.S.C. § 499(b)(4) and because revocation or suspension is not warranted in any event. Accordingly, the following Order is issued.

Order

The case brought by the United States Department of Agriculture in the above captioned matter is hereby **DISMISSED**. Pursuant to the Rules of Practice, this decision will become final without further proceedings 35 days after the date of service upon Respondents as provided by Section 1.142 of the Rules of Practice, 7 C.F.R. § 1.142 unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days as provided in Section 1.145 of the Rules of Practice, 7 C.F.R. § 1.145.

s/ William B. Moran
William B. Moran
United States Administrative Law Judge

March 28, 2005

APPENDIX C — DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, BEFORE THE SECRETARY OF AGRICULTURE DATED SEPTEMBER 8, 2005

UNITED STATES DEPARTMENT OF AGRICULTURE BEFORE THE SECRETARY OF AGRICULTURE

PACA Docket No. D-03-0026

In re:

G & T Terminal Packaging Co., Inc.,
and Tray-Wrap, Inc.,

Respondents

Decision and Order

PROCEDURAL HISTORY

Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this administrative proceeding by filing a Complaint on June 4, 2003. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

Appendix C

Complainant alleges: (1) during the period July 1999 through August 1999, G & T Terminal Packaging Co., Inc. [hereinafter Respondent G & T], through its president, director, and 100 percent stockholder, Anthony Spinale, made illegal payments to a United States Department of Agriculture inspector in connection with four federal inspections of perishable agricultural commodities which Respondent G & T purchased from one seller in interstate or foreign commerce; (2) during the period March 1999 through June 1999, Tray-Wrap, Inc. [hereinafter Respondent Tray-Wrap], through its employee or agent, Anthony Spinale, made illegal payments to a United States Department of Agriculture inspector in connection with six federal inspections of perishable agricultural commodities which Respondent Tray-Wrap purchased from four sellers in interstate or foreign commerce; (3) on October 21, 1999, the United States Attorney for the Southern District of New York issued an indictment charging Anthony Spinale with making cash payments to a United States Department of Agriculture inspector in order to influence the outcome of inspections of fresh fruits and vegetables at Respondents' place of business; (4) on August 21, 2001, the United States District Court for the Southern District of New York entered a judgment in which Anthony Spinale pled guilty to one count of bribery of a public official in violation of 18 U.S.C. § 201(b); (5) Anthony Spinale made illegal payments to a United States Department of Agriculture inspector on numerous occasions prior to the period March 1999 through August 1999; and (6) Respondent G & T and Respondent Tray-Wrap [hereinafter Respondents] willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform a specification

or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce (Compl. ¶¶ III, V-VI).

On June 25, 2003, Respondents filed an Answer: (1) admitting that on or about October 21, 1999, the United States Attorney for the Southern District of New York issued an indictment charging that Anthony Spinale gave money to a United States Department of Agriculture produce inspector; (2) admitting that Anthony Spinale pled guilty to count nine of the October 21, 1999, indictment; and (3) denying the remaining material allegations of the Complaint.

On October 25-29, 2004, and November 1, 2004, Administrative Law Judge William B. Moran [hereinafter the ALJ] conducted an oral hearing in New York, New York. Clara A. Kim and Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant. Linda Stumpf, New Canaan, Connecticut, represented Respondents.

On January 10, 2005, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order, and on January 11, 2005, Respondents filed Post-Hearing Brief of Respondents. On February 22, 2005, Complainant filed Complainant's Reply to Respondents' Proposed Findings of Fact and Conclusions of Law and Respondents filed Post-Hearing Reply Brief of Respondents.

On March 29, 2005, the ALJ issued Decision of the Administrative Law Judge [hereinafter Initial Decision and

Order] finding Complainant failed to establish Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and dismissing the case (Initial Decision and Order at 1, 91).

On April 27, 2005, Complainant appealed to the Judicial Officer, and on May 23, 2005, Respondents filed Respondents' Response to Complainant's Appeal Petition. On May 31, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the ALJ's conclusion that Complainant failed to establish Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); therefore, I do not adopt the ALJ's Initial Decision and Order as the final Decision and Order.

Complainant's exhibits are designated by "CX." Respondents' exhibits are designated by "RX." The transcript is divided into six volumes, one volume for each day of the 6-day hearing. Each volume begins with page 1 and is sequentially numbered. References to "Tr. I" are to the volume of the transcript that relates to the October 25, 2004, segment of the hearing; references to "Tr. II" are to the volume of the transcript that relates to the October 26, 2004, segment of the hearing; references to "Tr. III" are to the volume of the transcript that relates to the October 27, 2004, segment of the hearing; references to "Tr. IV" are to the volume of the transcript that relates to the October 28, 2004, segment of the hearing; references to "Tr. V" are to the volume of the transcript that relates to the October 29, 2004, segment of the hearing; and references to "Tr. VI" are to the volume of the transcript that relates to the November 1, 2004, segment of the hearing.

Appendix C

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7 —AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to

perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

. . . .

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other

person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499b(4), 499h(a), 499p.

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

. . .

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section—

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; [and]

. . .

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act[.]

. . .

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

. . .

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. §§ 201(a)(1), (3), (b)(1)(A), (2).

DECISION

Facts and Discussion

Respondents are New York corporations that share the same business and mailing address, B266 New York City Terminal Market, Bronx, New York 10474 (Answer ¶ II). At all times material to this proceeding, Respondents were licensed under the PACA. PACA license number 204079 was issued to Respondent G & T on April 3, 1964, when Respondent G & T began operating, and PACA license number 701550 was issued to Respondent Tray-Wrap on May 13, 1970, when Respondent Tray-Wrap began operating. (Answer ¶ II; CX 10, CX 10A, CX 11, CX 11A.)

At all times material to this proceeding, Anthony Spinale was a director, the president, and the 100 percent owner of Respondent G & T and managed the business operations of Respondent Tray-Wrap (Tr. II at 205-07; Tr. III at 110-11, 119-24, 126-27, 135-37, 145-46; CX 10, CX 10A).

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William Cashin was employed, during the period July 1979 through August 1999, by the United States Department of Agriculture, Agricultural Marketing Service, Fresh Products Branch, as a produce inspector at the Hunts Point Terminal Market, New York (Tr. I at 66). From 1979 until August 1999, when William Cashin inspected Respondents' produce, he dealt with Anthony Spinale. Beginning about 1983 or 1984, until William Cashin left United States Department of Agriculture employment in August 1999, Anthony Spinale paid William Cashin in connection with inspections of perishable agricultural commodities conducted at Respondents' place of business. These payments were not made to the Agricultural Marketing Service as payment for normal inspection services, but rather were cash payments made to William Cashin personally. (Tr. I at 72-81.)

During the period July 1999 through August 1999, Respondent G & T, through Anthony Spinale, paid William Cashin in connection with four inspections of perishable agricultural commodities that Respondent G & T purchased from one produce seller in interstate or foreign commerce. During the period March 1999 through June 1999, Respondent Tray-Wrap, through Anthony Spinale, paid William Cashin in connection with six inspections of perishable agricultural commodities that Respondent Tray-Wrap purchased from four produce sellers in interstate or foreign commerce. (Tr. V at 188-97, 204-05, 209-19, 221, 227-41; Tr. VI at 82-84, 97-99, 108-14.)

During the period 1990 through 1999, Anthony Spinale paid United States Department of Agriculture produce inspector Edmund Esposito in connection with inspections

of perishable agricultural commodities at Respondents' place of business. These payments were not made to the Agricultural Marketing Service as payment for normal inspection services, but rather were cash payments made to Edmund Esposito personally. (Tr. IV at 183-84, 248-52.)

William Cashin was arrested by agents of the Federal Bureau of Investigation and charged with bribery and conspiracy to commit bribery. After his arrest, William Cashin entered into a cooperation agreement with the Federal Bureau of Investigation, whereby William Cashin agreed to assist the Federal Bureau of Investigation with an investigation of bribery by produce purchasers at the Hunts Point Terminal Market. During the investigation, William Cashin carried an audio, audio-video, or video recording device and surreptitiously recorded his interactions with various individuals at produce houses at the Hunts Point Terminal Market, including interactions with Anthony Spinale at Respondents' place of business. At the end of each day, William Cashin gave the tapes and any payments received to Federal Bureau of Investigation agents and recounted to Federal Bureau of Investigation agents what had occurred that day. Federal Bureau of Investigation agents completed FD-302 forms which reflect what William Cashin told them each day. All of Respondents' payments to a United States Department of Agriculture inspector alleged in paragraph III of the Complaint relate to the investigation conducted by the Federal Bureau of Investigation with William Cashin's assistance. (Tr. I at 86-98.)

On October 21, 1999, the United States Attorney for the Southern District of New York issued an indictment charging

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Anthony Spinale with nine counts of bribery of a public official in violation of 18 U.S.C. § 201(b) (Answer ¶ IV(a)). The indictment alleged that Anthony Spinale:

> [U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public official, with intent to influence official acts, to wit, ANTHONY SPINALE, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit[s] and vegetables conducted at Tray-Wrap, Inc. and G & T Terminal Packaging Corp., both located at Hunts Point Terminal Market, Bronx, New York[.]

CX 17 at 1. The alleged bribes covered payments made to William Cashin in connection with 10 inspections of perishable agricultural commodities. (CX 1-CX 9, CX 17.) On August 21, 2001, the United States District Court for the Southern District of New York entered a judgment in which Anthony Spinale pled guilty to one count of bribery of a public official in violation of 18 U.S.C. § 201(b)(1) and was sentenced to 5 years' probation, 12 months' home confinement, and a $30,000 fine. (Answer ¶ IV(b); CX 18, CX 20.)

The PACA does not specifically provide that a payment to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities is a violation of the PACA. However, the PACA provides that it is unlawful for any commission merchant,

dealer, or broker: (1) to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity; (2) to fail or refuse truly and correctly to account and to make full payment promptly with respect to any transaction involving any perishable agricultural commodity; and (3) to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity.[1]

Anthony Spinale testified he made payments to United States Department of Agriculture inspectors as alleged in the Complaint, but contends he made the payments as a result of "soft extortion" by United States Department of Agriculture inspectors and only to obtain prompt inspections of Respondents' perishable agricultural commodities and accurate United States Department of Agriculture inspection certificates (Tr. V at 186-97, 199-205, 208-21, 229-41; Tr. VI at 97-99, 108-14). While the record contains evidence that, at least some of Anthony Spinale's payments to United States Department of Agriculture inspectors were bribes to obtain false United States Department of Agriculture inspection certificates (CX 18, CX 19, CX 20), I find, even if United States Department of Agriculture inspectors extorted each payment from Anthony Spinale and, in exchange for the payments, provided prompt inspections and issued accurate United States Department of Agriculture inspection certificates, Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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1. 7 U.S.C. § 499b(4).

Appendix C

A payment to a United States Department of Agriculture inspector to obtain a prompt inspection of perishable agricultural commodities and an accurate United States Department of Agriculture inspection certificate negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture inspector and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture inspectors. A PACA licensee's payment to a United States Department of Agriculture inspector, whether it is to obtain an accurate United States Department of Agriculture inspection certificate or an inaccurate United States Department of Agriculture inspection certificate, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture inspector.

Respondents called a former United States Department of Agriculture produce inspector, Edmund Esposito, who testified that Anthony Spinale paid him to obtain prompt inspections of perishable agricultural commodities and accurate United States Department of Agriculture inspection certificates. However, Edmund Esposito's testimony also

reveals one way by which such payments can affect an inspector's objectivity and integrity and can result in the issuance of inaccurate United States Department of Agriculture inspection certificates, as follows:

[BY MS. STRUMPF:]

Q. Okay. And did Mr. Spinale ever ask you to alter an inspection?

[BY MR. ESPOSITO:]

A. No.

Q. Did he ever ask you to falsify an inspection?

A. No.

Q. Did you ever downgrade an inspection for Mr. Spinale?

A. Downgrade —

Q. I can rephrase the question if you don't understand it.

A. No, I understand the question, I'm just trying to think. He's never asked me to. I gave him a benefit of doubt on inspections.

Q. And what do you mean by that?

A. Well, if he's on the line I would throw up and make sure he's out.

Q. And did he ever ask you to do that?

A. No.

Q. Did you ever have any conversations with him —

A. Not with him, no.

Q. — where he asked you to do that?

A. Not with him, no.

. . .

Q. Why did you do it?

. . .

A. Because I got paid and he's a nice guy, after he quit appealing me.

Tr. IV at 251-52.

The relationship between a PACA licensee and its employees acting within the scope of their employment is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his or her employment or office, shall in every case be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.

Anthony Spinale was acting within the scope of his employment when he knowingly and willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, the knowing and willful violations by Anthony Spinale are deemed to be knowing and willful violations by Respondents.[2]

Complainant's Appeal Petition

Complainant raises six issues in Complainant's Appeal to Judicial Officer [hereinafter Appeal Petition]. First, Complainant contends the ALJ erroneously stated the ALJ's credibility findings should not be reviewed by the Judicial Officer (Complainant's Appeal Pet. at 5).

I have carefully reviewed the ALJ's Initial Decision and Order, and I cannot locate any statement by the ALJ indicating that his credibility determinations should not be reviewed by the Judicial Officer. To the contrary, the ALJ specifically states his credibility determinations are reviewable, but those credibility determinations are entitled to deference (Initial Decision and Order at 81 n.115). I agree with the ALJ. The Judicial Officer's consistent practice is to give great weight to

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2. Post & *Taback, Inc. v. Department of Agriculture*, 123 Fed. Appx. 406, 408 (D.C. Cir. 2005); *H.C. MacClaren, Inc. v. United States Dep't ofAgric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 782-83 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994), *aff'd*, 91 F.3d 173 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4118 (2d Cir. Apr. 16, 1996).

credibility determinations of administrative law judges, since they have the opportunity to see and hear witnesses testify.[3]

Second, Complainant contends the ALJ erroneously failed to follow *In re Post & Taback, Inc.*, 62 Agric. Dec.

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3. *In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. __, slip op. at 33-37 (May 9, 2005); *In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 561-62 (2001), *appeal dismissed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 602 (1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1055-56 (1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, 12 Fed. Appx. 718, 2001 WL 401594 (10th Cir.), *cert. denied*, 534 U.S. 1440 (2001); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech, 37* Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

802 (2003), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005) (Complainant's Appeal Pet. at 5-9).

In *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), I concluded a PACA licensee's payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities violates section 2(4) of the PACA (7 U.S.C. § 499b(4)). The ALJ found Respondents, through Anthony Spinale, made payments to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities, as alleged in the Complaint. The ALJ states such payments, under any circumstances, are "wrong." (Initial Decision and Order at 84, 90.) Despite these findings, the ALJ concluded Complainant failed to establish the alleged violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and dismissed the Complaint. (Initial Decision and Order at 1, 84, 90-91.)

In light of the ALJ's finding that Anthony Spinale made payments as alleged in the Complaint, it would appear the ALJ erroneously failed to follow *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), when he dismissed the Complaint. However, the ALJ distinguishes the instant proceeding from *Post & Taback, Inc.* The ALJ found United States Department of Agriculture inspectors extorted payments from Anthony Spinale and Anthony Spinale made payments to United States Department of Agriculture inspectors to obtain prompt produce inspections and accurate United States Department of Agriculture inspection certificates (Initial Decision and Order at 83, 90). In *Post & Taback, Inc.*, I specifically found no evidence of extortion and found the PACA licensee's

payments were made to a United States Department of Agriculture inspector to obtain inaccurate United States Department of Agriculture inspection certificates, which were then used to make false and misleading statements to produce sellers.[4]

I disagree with the ALJ's conclusion that *Post & Taback, Inc.*, can be distinguished from the instant proceeding. As discussed in this Decision and Order, *supra*, commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture inspectors. Even if I were to find Anthony Spinale made all of the payments to United States Department of Agriculture inspectors to obtain prompt inspections of perishable agricultural commodities and accurate United States Department of Agriculture inspection certificates and Anthony Spinale made all of the payments as a result of extortion by United States Department of Agriculture inspectors, I would follow *Post & Taback, Inc.* The extortion evidenced in this proceeding is not a "reasonable cause," under section 2(4) of the PACA (7 U.S.C. § 499b(4)), for a commission merchant, dealer, or broker to fail to perform the implied duty to refrain from paying United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities. Moreover,

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4. *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 819-20 (2003).

avoidance of inspection delays and avoidance of the issuance of inaccurate United States Department of Agriculture inspection certificates are not "reasonable causes," under section 2(4) of the PACA (7 U.S.C. § 499b(4)), for a commission merchant, dealer, or broker to fail to perform the implied duty to refrain from paying United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities.

A PACA licensee's payment to a United States Department of Agriculture inspector, whether caused by bribery or extortion and whether to obtain an accurate United States Department of Agriculture inspection certificate or an inaccurate United States Department of Agriculture inspection certificate, undermines the trust a produce seller places in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture inspector.

Third, Complainant contends the ALJ erroneously gave the FD-302 forms (CX 1-CX 9) no weight (Complainant's Appeal Pet. at 9-10).

The ALJ gave the FD-302 forms no probative weight (Initial Decision and Order at 7-8). I disagree with the ALJ and give the FD-302 forms probative weight.

Anthony Spinale, who the ALJ found credible, admitted the material facts on the FD-302 forms. Anthony Spinale testified he paid William Cashin $100 in connection with an inspection of tomatoes reflected on United States Department of Agriculture Inspection Certificate Number K-678086-0

(Tr. V at 189-90; RX 1A). United States Department of Agriculture Inspection Certificate Number K-678086-0, signed by William Cashin, establishes that William Cashin conducted an inspection of tomatoes at Respondent Tray-Wrap on March 24, 1999, at 1:30 p.m. (RX 1A; CX 1 at 5). The corresponding FD-302 form states an unnamed source reported that, on March 24, 1999, while at Respondent Tray-Wrap, the source performed one inspection and Anthony Spinale paid him $100 for the inspection (CX 1 at 3-4).

Anthony Spinale testified he paid William Cashin $100 in connection with an inspection of tomatoes reflected on United States Department of Agriculture Inspection Certificate Number K-678091-0 (Tr. V at 190-94; RX 2A). United States Department of Agriculture Inspection Certificate Number K-678091-0, signed by William Cashin, establishes that William Cashin conducted an inspection of tomatoes at Respondent Tray-Wrap on March 26, 1999, at 11:20 a.m. (RX 2A; CX 2 at 5). The corresponding FD-302 form states an unnamed source reported that, on March 26, 1999, at approximately 11:30 a.m., while at Respondent Tray-Wrap, the source inspected tomatoes and Anthony Spinale paid him $100 for the inspection (CX 2 at 3-4).

Anthony Spinale testified he paid William Cashin $100 in connection with an inspection of one load of tomatoes reflected on United States Department of Agriculture Inspection Certificate Number K-679811-0 (Tr. V at 186-88, 194-96; RX 3A). United States Department of Agriculture Inspection Certificate Number K-679811-0, signed by William Cashin, establishes that William Cashin conducted an inspection of tomatoes at Respondent Tray-Wrap on

April 23, 1999, at 11:35 a.m. (RX 3A; CX 3 at 5). The corresponding FD-302 form states an unnamed source reported that, on April 23, 1999, at approximately 11:30 a.m., while at Respondent Tray-Wrap, the source inspected one load of tomatoes and Anthony Spinale paid him $100 for the inspection (CX 3 at 3-4).

Anthony Spinale testified he paid William Cashin $100 in connection with an inspection of one load of tomatoes reflected on United States Department of Agriculture Inspection Certificate Number K-765769-5 (Tr. V at 196-97, 199-205; RX 4A). United States Department of Agriculture Inspection Certificate Number K-765769-5, signed by William Cashin, establishes that William Cashin conducted an inspection of tomatoes at Respondent Tray-Wrap on May 20, 1999, at 12:20 p.m. (RX 4A; CX 4 at 5). The corresponding FD-302 form states an unnamed source reported that, on May 20, 1999, at approximately 12:30 p.m., while at Respondent Tray-Wrap, the source performed one inspection of tomatoes and Anthony Spinale paid him $100 for the inspection (CX 4 at 3-4).

Anthony Spinale testified he paid William Cashin $100 in connection with an inspection of tomatoes reflected on United States Department of Agriculture Inspection Certificate Number K-767032-6 (Tr. V at 208-21; RX 5A). United States Department of Agriculture Inspection Certificate Number K-767032-6, signed by William Cashin, establishes that William Cashin conducted an inspection of tomatoes at Respondent Tray-Wrap on June 16, 1999, at 11:25 a.m. (RX 5A; CX 5 at 6). The corresponding FD-302 form states an unnamed source reported that, on June 16, 1999, at

approximately 11:15 a.m., while at Respondent Tray-Wrap, the source performed one inspection of tomatoes and Anthony Spinale paid him $100 for the inspection (CX 5 at 4-5).

Anthony Spinale testified he paid William Cashin $100 in connection with an inspection of tomatoes reflected on United States Department of Agriculture Inspection Certificate Number K-767363-5 (Tr. V at 229-40; RX 6A). United States Department of Agriculture Inspection Certificate Number K-767363-5, signed by William Cashin, establishes that William Cashin conducted an inspection of tomatoes at Respondent Tray-Wrap on June 23, 1999, at 11:10 a.m. (RX 6A; CX 6 at 5). The corresponding FD-302 form states an unnamed source reported that, on June 23, 1999, while at Respondent Tray-Wrap, the source performed an inspection of tomatoes and Anthony Spinale paid him $100 for the inspection (CX 6 at 3-4).

Anthony Spinale testified he paid William Cashin $100 in connection with an inspection reflected on United States Department of Agriculture Inspection Certificate Number K-768741-1 (Tr. VI at 97-99; RX 10B). United States Department of Agriculture Inspection Certificate Number K-768741-1, signed by William Cashin, establishes that William Cashin conducted an inspection of potatoes at Respondent G & T on July 15, 1999, at 12:00 p.m. (RX 10B; CX 7 at 5). The corresponding FD-302 form states an unnamed source reported that, on July 15, 1999, at approximately 12:00 noon, he went to Respondent G & T and performed an inspection of a railroad car of potatoes and Anthony Spinale paid him $100 for the inspection (CX 7 at 3-4).

Appendix C

Anthony Spinale testified he paid William Cashin $200 in connection with inspections of two loads of potatoes reflected on United States Department of Agriculture Inspection Certificate Numbers K-769382-3 and K-769381-5 (Tr. VI at 108-14; RX 11B, RX 12B). United States Department of Agriculture Inspection Certificate Number K-769382-3, signed by William Cashin, establishes that William Cashin conducted an inspection of potatoes for Respondent G & T on July 26, 1999, at 1:30 p.m. (RX 11B; CX 8 at 7). United States Department of Agriculture Inspection Certificate Number K-769381-5, signed by William Cashin, establishes that William Cashin conducted an inspection of potatoes for Respondent G & T on July 26, 1999, at 12:30 p.m. (RX 12B; CX 8 at 6). The corresponding FD-302 form states an unnamed source reported that, on July 26, 1999, he performed inspections of two loads of potatoes and Anthony Spinale paid him $200 for the two inspections (CX 8 at 3-5).

Finally, in *United States of America v. Spinale*, Case Number 1:99 Cr. 01093-(01) (RCC) (S.D.N.Y. 2001), the United States Attorney for the Southern District of New York issued an indictment charging Anthony Spinale with nine counts of bribery of a public official in violation of 18 U.S.C. § 201(b). The nine counts relate to payments made to William Cashin that are reflected in the FD-302 forms (CX 17). Anthony Spinale admitted under oath that he paid William Cashin as alleged in the indictment, as follows:

THE COURT: Mr. Spinale, you are charged in a nine-count Indictment. Count Nine of the Indictment charges you with bribing a public official, in violation of Title 18, United States Code, Section 201(b)(1)(A). . . .

. . . .

Appendix C

Have you seen a copy of the Indictment in which the government makes this charge against you?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you discussed it with your attorney?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you prepared to enter a plea today?

THE DEFENDANT: Yes.

THE COURT: Anthony Spinale, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: Mr. Spinale, before a guilty plea can be accepted, I must determine that you understand the plea and its consequences, that the plea is voluntary and that there is a factual basis for the plea. For that purpose, I must ask you a number of questions and your answers must be under oath.

Do you understand, Mr. Spinale, that the answers you give under oath may subject you to prosecution for perjury if you do not tell the truth?

THE DEFENDANT: Yes, your Honor.

THE COURT: . . . .

Mr. Spinale, did you commit the offense which you had been charged with?

THE DEFENDANT: Yes, your Honor.

THE COURT: Tell me in your own words what you did.

THE DEFENDANT: On August 13, 1999, I paid money to Bill Cashin for the purpose of influencing the outcome of his inspection report on a load of potatoes. I told him the specific amount I wanted him to put in the inspection report.

On the other dates in the indictment, I paid Mr. Cashin $100 per inspection to influence the outcome of the report.

Your Honor, I would like to state I never intended to defraud the shippers who had sent me the produce.

THE COURT: Who is Bill Cashin?

THE DEFENDANT: Bill Cashin is a USDA inspector, produce inspector.

THE COURT: ....

He was inspecting the produce, is that correct?

THE DEFENDANT: I was paying him to dictate what he was putting into his report.

THE COURT: So it was his job to make reports about the produce that he was inspecting, and you were trying to influence him to write things in the report?

THE DEFENDANT: Yes.

THE COURT: And did you know what you were doing was wrong?

THE DEFENDANT: Yes.

THE COURT: Where did this take place?

THE DEFENDANT: In the Hunts Point Terminal Market, produce market.

CX 19 at 3-4, 10-11.

Based on Anthony Spinale's testimony in this proceeding and admissions in *United States of America v. Spinale*, I find the FD-302 forms accurately reflect payments Anthony Spinale made to William Cashin in connection with the inspection of perishable agricultural commodities, and I find the ALJ erroneously failed to give the FD-302 forms probative weight.

Fourth, Complainant contends the ALJ's determination that William Cashin was not credible, is error (Complainant's Appeal Pet. at 10-12).

The ALJ found "in all aspects where [William Cashin's] testimony conflicted with Mr. Spinale's testimony, Mr. Spinale's testimony was credible and Cashin's was not." (Initial Decision and Order at 81.)

Appendix C

As an initial matter, William Cashin's testimony conflicts with Anthony Spinale's testimony only regarding the purpose and reasons for Anthony Spinale's payments to William Cashin. Both William Cashin and Anthony Spinale testified that Anthony Spinale made payments to William Cashin in connection with William Cashin's inspections of perishable agricultural commodities for Respondents. William Cashin and Anthony Spinale also agreed on the amount of the payments and the dates of the payments. The only conflict is that Anthony Spinale testified William Cashin engaged in "soft extortion" and he (Anthony Spinale) made the payments to obtain prompt inspections and accurate United States Department of Agriculture inspection certificates, whereas William Cashin testified Anthony Spinale engaged in bribery and made payments to obtain inaccurate United States Department of Agriculture inspection certificates (Tr. I at 81-88, 129-30). As discussed in this Decision and Order, *supra*, the purpose and reasons for Anthony Spinale's payments to William Cashin are not relevant to this proceeding. A payment to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities, whether the result of extortion evidenced in this proceeding or bribery and whether to obtain accurate or inaccurate United States Department of Agriculture inspection certificates, is a violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The Judicial Officer's consistent practice is to give great weight to credibility determinations of administrative law judges, since they have the opportunity to see and hear witnesses testify.[5] The ALJ detailed his reasons for finding

5. See note 3.

William Cashin's testimony was not credible. While there is some evidence that William Cashin's testimony regarding the purpose and reasons for Anthony Spinale's payments to William Cashin is credible, I do not fmd the record sufficiently strong to reverse the ALJ's credibility determination.

Fifth, Complainant contends the ALJ erroneously concluded that, to prove a violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), Complainant must prove Anthony Spinale's payments to United States Department of Agriculture inspectors resulted in the issuance of false United States Department of Agriculture inspection certificates and financially benefitted Respondents (Complainant's Appeal Pet. at 12-15).

The ALJ states Anthony Spinale paid William Cashin to obtain accurate United States Department of Agriculture inspection certificates and Respondents did not benefit financially from the transactions, as follows:

> . . . [T]he Court finds that as to the specific dates alleged in the Complaint, the produce really was as poor as the inspection certificate reflected and, in any event, Mr. Spinale did not improperly benefit financially from those transactions.
>
> . . . .
>
> Thus, regarding Cashin, the Court finds that he was extracting a personal "fee" for every *visit* to Mr. Spinale's place of business and that in no

> instance was Mr. Spinale benefitting from those visits in the critical ways that USDA asserts. That is to say, in no instance among the dates cited in the Complaint did Mr. Spinale seek or obtain from Cashin an inspection report which downgraded a load of produce from its actual condition. Mr. Spinale, like at least some other merchants at Hunts Point, was paying Cashin in order to receive a prompt and accurate inspection. As USDA recognized, both through witnesses and in its statements through counsel, these inspections involve produce and as such, if they are to be useful, it is critical that inspections be carried out promptly. Because of that fact, Cashin and his cabal of corrupt cronies knew they had merchants like Mr. Spinale over a barrel. The merchants could pay them or risk either a delayed inspection or an inspection which rated produce as acceptable when an honest assessment would determine otherwise.

Initial Decision and Order at 78, 82-83 (emphasis in original) (footnotes omitted).

Complainant does not allege that Respondents made false statements for a fraudulent purpose in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) or that Respondents benefitted financially from Anthony Spinale's payments to United States Department of Agriculture inspectors. Instead, Complainant alleges Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to perform a specification or duty, express or implied, arising out of an

undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce (Compl. ¶ VI).

As stated in this Decision and Order, *supra*, I fmd commission merchants, dealers, and brokers have a duty to refrain from activities that negate, or give the appearance of negating, the impartiality of United States Department of Agriculture inspectors and activities that undermine the confidence that produce industry members and consumers place in quality and condition determinations rendered by United States Department of Agriculture inspectors. A PACA licensee's payment to a United States Department of Agriculture inspector in connection with an inspection of produce, whether the payment is designed to obtain an accurate United States Department of Agriculture inspection certificate or designed to obtain an inaccurate United States Department of Agriculture inspection certificate and whether the payment benefits the PACA licensee or does not benefit the PACA licensee, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture inspector.

Therefore, I disagree with the ALJ's conclusion that, to prove a violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), Complainant must prove United States Department of Agriculture inspection certificates issued in connection with Anthony Spinale's payments to United States Department of Agriculture inspectors were false and Respondents benefitted financially from the payments.

Sixth, Complainant contends the ALJ erroneously found United States Department of Agriculture produce inspectors extorted money from Anthony Spinale, erroneously found extortion was relevant to this proceeding, and erroneously found extortion mitigates or exonerates Respondents' illegal payments (Complainant's Appeal Pet. at 16-26).

As stated in this Decision and Order, *supra*, I do not find the reason for Anthony Spinale's payments to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities relevant to this proceeding. Anthony Spinale's payment to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities, whether the result of extortion evidenced in this proceeding or bribery, violates section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Findings of Fact

1. Respondent G & T is a New York corporation whose business and mailing address is B266 New York City Terminal Market, Bronx, New York 10474 (Answer ¶ II).

2. Respondent Tray-Wrap is a New York corporation whose business and mailing address is B266 New York City Terminal Market, Bronx, New York 10474 (Answer ¶ II).

3. At all times material to this proceeding, Respondent G & T was licensed under the PACA. PACA license number 204079 was issued to Respondent G & T on April 3, 1964, when Respondent G & T began operating. Respondent G &

T's PACA license has been renewed annually and is next subject to renewal on April 3, 2006. (Answer ¶ II; CX 10, CX 10A.)

4. At all times material to this proceeding, Respondent Tray-Wrap was licensed under the PACA. PACA license number 701550 was issued to Respondent Tray-Wrap on May 13, 1970, when Respondent Tray-Wrap began operating. Respondent Tray-Wrap's PACA license has been renewed annually and is next subject to renewal on May 13, 2006. (Answer ¶ II; CX 11, CX 11A.)

5. At all times material to this proceeding, Anthony Spinale was a director, the president, and the 100 percent owner of Respondent G & T (Tr. II at 205-07; Tr. III at 126-27; CX 10, CX 10A).

6. Anthony Spinale is the founder of Respondent Tray-Wrap and has managed the day-to-day operations of Respondent Tray-Wrap since the inception of Respondent Tray-Wrap. At all times material to this proceeding, Anthony Spinale managed the business operations of Respondent Tray-Wrap. (Tr. III at 110-11, 119-24, 135-37, 145-46.)

7. William Cashin was employed, during the period July 1979 through August 1999, by the United States Department of Agriculture, Agricultural Marketing Service, Fresh Products Branch, as a produce inspector at the Hunts Point Terminal Market, New York (Tr. I at 66).

8. From 1979 until August 1999, when William Cashin inspected Respondents' perishable agricultural commodities,

he dealt with Anthony Spinale. Beginning about 1983 or 1984 until August 1999, Anthony Spinale paid William Cashin in connection with inspections of perishable agricultural commodities at Respondents' place of business. These payments were not made to the Agricultural Marketing Service as payment for normal inspection services, but rather were cash payments made to William Cashin personally. (Tr. I at 72-81.)

9. During the period July 1999 through August 1999, Respondent G & T, through its president, director, and 100 percent stockholder, Anthony Spinale, made the following payments to a United States Department of Agriculture inspector in connection with four inspections of perishable agricultural commodities that Respondent G & T purchased from one produce seller in interstate or foreign commerce:

a. On July 15, 1999, Respondent G & T paid $100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-768741-1.

b. On July 26, 1999, Respondent G & T paid $100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-769381-5.

c. On July 26, 1999, Respondent G & T paid $100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural

commodities reflected on United States Department of Agriculture Inspection Certificate Number K-769382-3.

d. On August 13, 1999, Respondent G & T paid $100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-770380-4.

(Tr. V at 188-97, 204-05, 209-19, 221, 227-41; Tr. VI at 82-84, 97-99, 108-14; CX 7, CX 8, CX 19 at 3-4, 10-11; RX 10B, RX 11B, RX 12B.)

10. During the period March 1999 through June 1999, Respondent Tray-Wrap, through its employee or agent, Anthony Spinale, made the following payments to a United States Department of Agriculture inspector in connection with six inspections of perishable agricultural commodities that Respondent Tray-Wrap purchased from four produce sellers in interstate or foreign commerce:

a. On March 24, 1999, Respondent Tray-Wrap paid $100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-678086-0.

b. On March 26, 1999, Respondent Tray-Wrap paid $100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-678091-0.

c. On April 23, 1999, Respondent Tray-Wrap paid $100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-679811-0.

d. On May 20, 1999, Respondent Tray-Wrap paid $100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-765769-5.

e. On June 16, 1999, Respondent Tray-Wrap paid $100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-767032-6.

f. On June 23, 1999, Respondent Tray-Wrap paid $100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-767363-5.

(Tr. V at 188-97, 204-05, 209-19, 221, 227-41; Tr. VI at 82-84, 97-99, 108-14; CX 1-CX 6, CX 19 at 3-4, 10-11; RX 1A, RX 2A, RX 3A, RX 4A, RX 5A, RX 6A.)

11. During the period 1990 through 1999, Anthony Spinale paid United States Department of Agriculture produce inspector Edmund Esposito in connection with inspections of perishable agricultural commodities that

Edmund Espoused conducted at Respondents' place of business. These payments were not made to the Agricultural Marketing Service as payment for normal inspection services, but rather were cash payments made to Edmund Esposito personally. (Tr. IV at 183-84, 248-52.)

12. On March 23, 1999, William Cashin was arrested by agents of the Federal Bureau of Investigation and charged with bribery and conspiracy to commit bribery. After his arrest, William Cashin entered into a cooperation agreement with the Federal Bureau of Investigation, whereby William Cashin agreed to assist the Federal Bureau of Investigation with an investigation of bribery by produce purchasers at the Hunts Point Terminal Market (Tr. I at 89).

13. During the investigation identified in Finding of Fact 12, William Cashin carried an audio, audio-video, or video recording device and surreptitiously recorded his interactions with various individuals at produce houses at the Hunts Point Terminal Market, including interactions with Anthony Spinale at Respondents' place of business. At the end of each day, William Cashin gave the tapes and any payments received to Federal Bureau of Investigation agents and recounted to Federal Bureau of Investigation agents what had occurred that day. The Federal Bureau of Investigation agents completed FD-302 forms which reflect what William Cashin told them each day. All of the payments alleged in paragraph III of the Complaint and identified in Finding of Fact 9 and Finding of Fact 10 relate to the investigation conducted by the Federal Bureau of Investigation with William Cashin's assistance. (Tr. I at 86-98.)

14. In October 1999, Edmund Esposito was arrested and charged with racketeering. Edmund Esposito pled guilty to bribery in March 2000. (Tr. IV at 184-85.)

15. On October 21, 1999, the United States Attorney for the Southern District of New York issued an indictment charging Anthony Spinale with nine counts of bribery of a public official in violation of 18 U.S.C. § 201(b). The indictment alleged that Anthony Spinale:

> [U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public official, with intent to influence official acts, to wit, ANTHONY SPINALE, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit[s] and vegetables conducted at Tray-Wrap, Inc. and G & T Terminal Packaging Corp., both located at Hunts Point Terminal Market, Bronx, New York[.]

CX 17 at 1.

The bribes alleged in the indictment, covered payments made to William Cashin in connection with 10 inspections of perishable agricultural commodities identified in Finding of Fact 9 and Finding of Fact 10. (CX 1-CX 9, CX 17.)

16. On August 21, 2001, Anthony Spinale pled guilty to count nine of the criminal indictment (bribery of a public official (18 U.S.C. § 201(b)(l)(A)) and was sentenced to 5 years' probation, 12 months' home confinement, and a $30,000 fine. (Answer ¶ IV(b); CX 18, CX 20.)

Appendix C

Conclusion of Law

Respondents engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform an implied duty arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce.

For the foregoing reasons, the following Order should be issued.

ORDER

1. Respondent G & T's PACA license is revoked. The revocation of Respondent G & T's PACA license shall become effective 60 days after service of this Order on Respondent G & T.

2. Respondent Tray-Wrap's PACA license is revoked. The revocation of Respondent Tray-Wrap's PACA license shall become effective 60 days after service of this Order on Respondent Tray-Wrap.

Done at Washington, DC

September 8, 2005

s/ William G. Jenson
William G. Jenson
Judicial Officer

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 8, 2007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date:

Docket	**05-5634-ag**
Short Title:	G&T Terminal Packaging Co., Inc. v. United States
Agency Number:	D-03-26
Agency:	Department of Agriculture

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of February two thousand seven.

G&T Terminal Packaging Co., Tray-Wrap, Inc.,

Petitioners,

v.

United States Department of Agriculture,

Respondent.

Appendix D

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant G&T Terminal Packaging Co., Tray-Wrap, Inc. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Thomas Asreen, Acting Clerk
By: s/ Arthur Heller
Motion Staff Attorney

APPENDIX E — STATUTES AND REGULATION INVOLVED

Title 18 United States Code, Section 1951

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect *section 17 of Title 15*, sections 52, *101-115, 151-166 of Title 29* or *sections 151-188 of Title 45*.

Title 5 United States Code, Section 558

Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested

parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with *sections 556* and *557* of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) Notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) Opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

Appendix E

Title 26 Code of Federal Regulations, Section 301.6651-1

301.6651-1 Failure to file tax return or to pay tax.

c) Showing of reasonable cause. **(1)** Except as provided in subparagraphs (3) and (4) of this paragraph (b), [*FN1*] a taxpayer who wishes to avoid the addition to the tax for failure to file a tax return or pay tax must make an affirmative showing of all facts alleged as a reasonable cause for his failure to file such return or pay such tax on time in the form of a written statement containing a declaration that it is made under penalties of perjury. Such statement should be filed with the district director or the director of the service center with whom the return is required to be filed; *Provided*, That where special tax returns of liquor dealers are delivered to an alcohol, tobacco and firearms officer working under the supervision of the Regional Director, Bureau of Alcohol, Tobacco and Firearms, such statement may be delivered with the return. If the district director, the director of the service center, or, where applicable, the Regional Director, Bureau of Alcohol, Tobacco and Firearms, determines that the delinquency was due to a reasonable cause and not to willful neglect, the addition to the tax will not be assessed. If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay

is due to a reasonable cause. A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship (as described in *§ 1.6161-1(b)* of this chapter) if he paid on the due date. In determining whether the taxpayer was unable to pay the tax in spite of the exercise of ordinary business care and prudence in providing for payment of his tax liability, consideration will be given to all the facts and circumstances of the taxpayer's financial situation, including the amount and nature of the taxpayer's expenditures in light of the income (or other amounts) he could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax. Thus, for example, a taxpayer who incurs lavish or extravagant living expenses in an amount such that the remainder of his assets and anticipated income will be insufficient to pay his tax, has not exercised ordinary business care and prudence in providing for the payment of his tax liability. Further, a taxpayer who invests funds in speculative or illiquid assets has not exercised ordinary business care and prudence in providing for the payment of his tax liability unless, at the time of the investment, the remainder of the taxpayer's assets and estimated income will be sufficient to pay his tax or it can be reasonably

foreseen that the speculative or illiquid investment made by the taxpayer can be utilized (by sale or as security for a loan) to realize sufficient funds to satisfy the tax liability. A taxpayer will be considered to have exercised ordinary business care and prudence if he made reasonable efforts to conserve sufficient assets in marketable form to satisfy his tax liability and nevertheless was unable to pay all or a portion of the tax when it became due.

Title 7 United States Code Section 499b

Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

(1) For any commission merchant, dealer, or broker to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce.

(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought

or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer.

(3) For any commission merchant to discard, dump, or destroy without reasonable cause, any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce.

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust

as required under *section 499e(c)* of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, any commission merchant, dealer, or broker who has violated—

(A) Any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or

(B) Any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant;

and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.

(6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such card, stencil, stamp, tag, or other notice contains a certificate or statement under authority of any Federal or State inspector or in compliance with any Federal or State law or regulation as to the grade or quality of the commodity contained in such container or railroad car or the State or country in which such commodity was produced.

Appendix E

(7) For any commission merchant, dealer or broker, without the consent of an inspector, to make, cause, or permit to be made any change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity after it has been officially inspected for grading and certification, but this shall not prohibit re-sorting and discarding inferior produce.

* * * *